Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE ATLANTIC CITY POLICE DEPARTMENT,

Petitioner,

v.

DONNA M. HURLEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Chapel Hill, NC 27599-3380
(919) 962-3688

DENNIS M. TUOHY
TUOHY, TUOHY & BLEE
20 S. Tennessee Avenue
Atlantic City, NJ
08401-7138
(609) 345-0005
Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23598

QUESTION PRESENTED

Whether, in a Title VII sexual harassment case, an employer's liability can be determined by use of the Harmless Error Doctrine, 28 U.S.C. § 2111, superimposed on the jury's general verdict where one of the four liability instructions is found to be legally defective and to be unsupported by the evidence.

PARTIES TO THIRD CIRCUIT PROCEEDINGS

In the proceedings before the Third Circuit, the named Defendants-Appellants, as well as the named Cross-Appellees, were the Atlantic City Police Department (ACPD), Henry Madamba, Nicholas V. Rifice, and John Mooney. The ACPD is the only Petitioner before this Court.

Donna M. Hurley and Patrick K. Hurley, wife and husband, were the named Plaintiffs-Appellees, as well as the named Cross-Appellants, in the Third Circuit proceedings. The only Respondent before this Court is Donna M. Hurley.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, The Atlantic City Police Department, respectfully requests that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on March 18, 1999 and amended on May 11, 1999.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 174 F.3d 95. (App. 1-103)

The Opinion of the United States District Court for the District of New Jersey is reported at 933 F. Supp. 396. (App. 119-200)

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on March 18, 1999. (App. 109-113) The Court of Appeals denied a timely petition for rehearing on May 11, 1999. (App. 114-119) On July 22, 1999, Justice Souter granted Petitioner's application for an extension of time within which to file its petition for certiorari to and including September 8, 1999. (App. 201-202) The jurisdiction of this Court to review the

judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended by The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000(e)-2(a) *et seq.*, provides in relevant part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex. . . . "

28 U.S.C. § 2111, entitled Harmless Error, provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE[1]

On January 20, 1993, Respondent Donna M. Hurley ("Hurley"), a Sergeant with the Atlantic City Police Department ("ACPD"), filed a complaint against the Petitioner ACPD and individual officers Henry Madamba

[1] Within this Petition, references to the Appendix submitted to this Court will be cited as "App. ___." References to the Appendix on file with the United States Court of Appeals for the Third Circuit will be cited as "A___."

("Madamba"), Nicholas Rifice ("Rifice"), and John Mooney ("Mooney"). Jurisdiction was invoked pursuant to 42 U.S.C. § 1983. Plaintiff also asserted pendent state law claims, including violations of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* ("NJLAD"). On March 7, 1994, after receiving a right to sue letter from the E.E.O.C., plaintiff filed a second complaint. Jurisdiction was invoked pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.* The two complaints were then consolidated. The thrust of plaintiff's complaints was that she was subjected to sexual harassment and discrimination during her employment on the ACPD.

A. The Alleged Pre-1990 Harassment

Hurley joined the ACPD in February 1978. She claimed that she was subjected to several incidents of sexual harassment in the late 1970's, including supposedly demeaning comments by her supervisor, Sgt. Walter Raey, who had died eight years before trial. (A1213). The Third Circuit held that this evidence was improperly admitted because it was "too distant in time from the events at the center of the ACPD's liability." (App. 29, 174 F.3d at 112)

Hurley also claimed that throughout her career, she was given lowly positions that offered no useful experience or potential for advancement. Most of these positions, however, were also held by male officers and many male officers described them as desirable. In November

1987, Hurley was promoted and became one of the first female sergeants at the ACPD.

B. The 1990 Hostile Work Environment Claim

The events at the core of this case occurred in 1990 when Hurley was transferred to the midnight to 8:00 a.m. shift, commonly referred to as "Charlie Platoon." Hurley's direct supervisor was Captain Madamba; Mooney was a Sergeant on Charlie Platoon and Rifice was at that time the Inspector of Police.

Hurley alleged a series of incidents of harassment, discussed below, which began in January 1990 and continued through November 1990, when, at her request, she was transferred to another shift. As the District Court observed, the facts regarding these incidents were "hotly contested" and at trial there was "conflicting evidence with respect to almost everything." (App. 130, 933 F. Supp. at 404)

Graffiti. The centerpiece of Hurley's case was sexually explicit graffiti she saw on ACPD premises. The most graphic and inflammatory evidence at trial was P-1, the actual plasterboard wall taken from the roll call bathroom, which contained an anonymous and disgusting drawing and poem, referenced in full in the opinions of both the District Court and the Third Circuit. (App. 123, 933 F. Supp. at 402 n.2; App. 10, 174 F. 3d at 104 n.5) Hurley only saw P-1 on *one* occasion. (A2766-67) She never complained specifically about P-1. (A2767) Madamba, Rifice and many other superior officers never saw P-1 until this lawsuit and described it at trial as "offensive." (A4268, A4272)

Hurley also testified about graffiti on the roll call room wall, but admitted that she was rarely in that location and that the wall was painted over shortly after the graffiti appeared. (A2768-69) No other sexually graphic graffiti appeared thereafter on the roll call room wall. (A2769) Similarly, there was testimony from Hurley regarding one picture she observed on the first floor bathroom in one of the police buildings. (A2771-2772) The bathroom was open to the public and plaintiff normally did not use it. (A2771) That depiction was also painted over. (A2773)

Hurley was not the only officer subjected to crude graffiti. Madamba was also the victim of sexually explicit drawings, including a depiction in which he was sodomized by a dog. (A4264) He testified that he had seen graffiti in bathrooms over the years and that most was directed at superior officers, both male and female. (A4263) He also recalled sexually explicit depictions of former Chiefs of Police with their male aides. (A4268, A4270)

Hardship Request. Hurley testified that Madamba told her that "they" sent her to "break [his] balls" and that he did not expect her to be on the shift very long. Madamba denied the comment. Hurley further testified that Madamba suggested that she submit a hardship request to transfer from Charlie Platoon by claiming that her children were crying at night. (A2752)

Hurley had spoken with Madamba the year before in his capacity as stress officer in connection with her marital problems. (A275l) Hurley admitted that she did not

want to be on Charlie Platoon and that she believed the transfer was, in fact, a hardship. (A2752)

Preferential Days Off. Hurley complained that upon transfer to Charlie Platoon, her preferential days off were given to Sgt. Fair, who was promoted to the sergeant rank at the same time as Hurley, but because of where he ranked on the promotional list, technically had less seniority. (A2753-54) The order transferring Hurley to Charlie Platoon also transferred Sgt. Fair from Charlie Platoon. Hurley admitted that Sgt. Fair was transferred within a few weeks and Hurley immediately received her preferential days off. (A2754-55)

Sanitary Napkin Incident. Hurley testified about an incident in which a sanitary napkin was hung above the roll call podium. (A2762) Hurley admitted that she did not know when it was removed and did not know whether the captain ordered it taken down. (A2762) Hurley admitted that she did not complain to the ACPD about the sanitary napkin because she did not want anyone to know that it "bothered her." (A2763)

Three patrol officers, who were present at roll call when this incident occurred, testified that when the captain saw the sanitary napkin, he immediately ordered it taken down. (A4183, A4788, A4828) They also testified that the captain was angry, addressed the platoon and told them that this sort of behavior must stop. (A4184, A4788, A4827)

"Clicking Out." Hurley complained that her radio transmissions were "keyed out" or "clicked out," which occurs when an officer presses his or her microphone when another officer is speaking, thereby canceling the

transmission. (A2780) Hurley admitted that she was clicked out before she was assigned to Charlie Platoon and that other officers, both male and female, had been clicked out. (A2781) Hurley testified that she complained to her supervisor about clicking out, and he did nothing to stop it, although she was not aware of anything that could be done to stop the problem. (A2782)

There was trial testimony that clicking out had been a problem in the ACPD for years, and that superiors most frequently got clicked out. (A4254, A4355) Officers were threatened with termination for clicking out. (A4255) As of 1990, however, there was no technology available to stop clicking out or to identify the perpetrators. (A4256) Since that time, new technology enables the ACPD to determine who is clicking out, and clicking out is thus no longer a problem. (A4256)

Roll Call. Hurley claimed that she was treated with "disrespect" at roll call which she attended approximately 10% of the time. The extent of her supervisor's alleged disrespect was the "tone" in which he spoke to her. However, she admitted that her captain never raised his voice to her or used abusive language. (A2750)

Exclusion from Sergeant's Meetings. Hurley claimed that when she was first assigned to Charlie Platoon, she attended sergeant's meetings, but not later on. There was no testimony, however, that there were any type of staff meetings conducted by the Platoon captain and attended by other sergeants from which Hurley was excluded. In fact, Hurley admitted that she had private "meetings" with the captain which were not attended by other sergeants. (A5141)

Sick Time. Hurley testified that she received a letter from the Chief of Police regarding abuse of sick time and threatening discipline. She admitted – and it was undisputed at trial – that no disciplinary action was ever taken against her for this alleged abuse of sick time. (A2799) Indeed, many other officers, all male, testified that they received similar letters for alleged abuse of sick time, that they were aware that many officers received them, and no disciplinary action was ever taken against anyone. (A4837, A4890, A3890, A2866) Many officers testified that when they received such a letter, they ignored it and threw it in the trash. (A4837, A4891, A3866)

C. The *Quid Pro Quo* Claim

Hurley alleged that, in March 1990, she complained to Madamba about the sexual harassment. He allegedly replied that female officers in the private sector were protected from such harassment because "they sleep with their bosses." When Hurley tried to change the topic of conversation and commented on Madamba's apparent weight loss, he purportedly stated that he lost weight by "having sex a few times a day" and that women come to him "when they're ready." Hurley interpreted this entire conversation – which was denied by Madamba – as a solicitation by Madamba to have sex with him. (App. 133, 933 F. Supp. at 406)

Hurley did not submit to Madamba's alleged solicitation. There was no evidence that plaintiff suffered any tangible job detriment as a result of her refusal to submit to Madamba's supposed advances. Indeed, Hurley has never even alleged that there is a causal connection

between her failure to submit to Madamba's advances and any tangible employment action. (*See* App. 85, 174 F.3d at 134)

D. Hurley's Transfer And The Alleged Retaliation

In November 1990, Hurley requested a transfer from Charlie Platoon, which was granted. Madamba had no role in the transfer. Hurley claimed that her reassignment to the Property and Evidence unit was retaliatory because it was an undesirable and isolated shift. There was testimony, however, that the Property and Evidence Unit was a "plum" assignment.

Hurley further alleged that upon her transfer to the Property and Evidence Unit, she was denied a 3% pay increase for her plain clothes assignment. Hurley, however, never requested the increase for some time. After making that request, the increase was granted retroactively.

Hurley also contended that the sexually explicit and demeaning drawings and poems remained on the walls after her transfer. (A2770) She conceded, however, that she did not personally witness these drawings. (A2772)

E. Hurley's Only Claimed Compensatory Damages Were For Alleged Emotional Distress

Hurley worked continuously during the alleged harassment and made no claim in this case for lost wages. She sought only compensatory damages for alleged emotional distress. However, Hurley did not seek any treatment for her alleged sexual harassment related emotional

distress until three years after she was transferred from Charlie Platoon, and only then at the recommendation of her lawyer. (A4601)

Hurley's own expert testified that plaintiff's condition was "not severe" and admitted that he could not make any precise determination as to what caused the condition, i.e., the stresses in Hurley's life prior to 1990, such as her divorce action and the domestic violence complaints filed against her, or the alleged sexual harassment. (A1779, 1798) Hurley's expert also testified that Hurley's prognosis for a full recovery was "good." (A1734, 1740; App. 182, 933 F. Supp. at 424) Hurley has continued to work and earn full pay and benefits since the trial in this case.

F. The Jury Was Instructed on Four Theories Of Liability and Returned a General Verdict

Trial before the Honorable Joseph E. Irenas, U.S.D.J., and a jury commenced against the ACPD, Rifice and Madamba on November 27, 1995 and continued until February 13, 1996.[2] The jury was charged as to four types of discrimination: (1) intentional sexual discrimination, (2) hostile work environment sexual harassment, (3) *quid pro quo* sexual harassment, and (4) retaliation. (A5275)

With respect to *quid pro quo* harassment, the jury was instructed as follows:

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[2] The claims asserted by Patrick K. Hurley, plaintiff's husband, and the claims asserted against defendant John Mooney were dismissed pre-trial by summary judgment.

> To prove *quid pro quo* sexual harassment, plaintiff must prove by a preponderance of the evidence that someone with supervisory authority over her engaged in conduct that conditioned tangible job benefits including compensation, promotion and other terms, condition or privileges of employment on submission to unwelcome, sexual conduct or penalized her for refusing to participate in such conduct. (App. 83, 174 F.3d at 133-34)

Despite being charged on four different types of discrimination, over the defendants' objections, the jury was presented with only a general verdict form, in which it was asked three questions: whether the ACPD discriminated against Hurley because of her sex, whether Madamba discriminated against Hurley because of her sex, and whether Rifice discriminated against Hurley because of her sex. The jury returned a general verdict against Madamba and the ACPD and awarded $575,000 in compensatory damages. After a punitive damage hearing, the jury awarded Hurley $700,000 in punitive damages against the ACPD only.

Following defendants' motion for a new trial and remittitur, the court remitted Hurley's compensatory award to $175,000, finding that the "jury's evaluation of compensatory damages was so excessive as to shock the judicial conscience." (App. 182, 933 F. Supp. at 424) Hurley accepted the remittitur and the court awarded counsel fees and costs in her favor.

Defendants ACPD and Madamba appealed the amended judgment in favor of plaintiff. Hurley cross-appealed the District Court's Order granting defendant

Mooney's motion for summary judgment, the judgment in favor of defendant Rifice, her award of counsel fees and the District Court's Order denying prejudgment interest.

G. The Third Circuit Majority Affirmed A Tainted General Verdict Against the ACPD

Over a dissent by Judge Cowen, the Third Circuit reversed in part and affirmed in part the amended judgments against the ACPD and Madamba, and in favor of Rifice and Mooney. With respect to Madamba and Rifice, the panel held that the district court erroneously instructed the jury as to the standards for individual liability and vacated those judgments. The panel also vacated the punitive damage award against the ACPD because of error in the jury instruction. The panel, however, affirmed the compensatory damage verdict against the ACPD.

In affirming the compensatory award against the ACPD, the majority below acknowledged the "possibility" of legal error in submitting the case to the jury against the ACPD on a *quid pro quo* theory of liability, insofar as the jury was instructed that it could impose liability for threats that were not acted upon. Pointing to this Court's decision in *Maryland v. Baldwin*, 112 U.S. 490 (1884), the panel also "concede[d] the general correctness of the [ ] proposition that faulty instructions on which a general verdict could have been based require reversal." (App. 51, 174 F.3d at 121) However, relying on a single,

anomalous Tenth Circuit decision,[3] the panel majority rejected *Baldwin* and instead applied a harmless error analysis:

> The foundational case of *Maryland v. Baldwin*, 112 U.S. 490, 5 S. Ct. 278, 28 L. Ed. 822 (1884), addressed itself equally to faulty instructions and to erroneous admission of evidence, and announced that such errors require reversal. *See id.* at 493, 5 S. Ct. 278 ("If . . . upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld. . . . "). It has long been acknowledged, however, that *Baldwin* does not speak to the harmless error situation. . . . Evidentiary errors are subject to harmless error analysis, and the same is true for errors in instruction. . . . (App. 51, 174 F.3d at 121)

In dissent, Judge Cowen opined that the verdict against the ACPD should be reversed. He reasoned that this Court's recent pronouncement in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), made clear that to prove a claim of *quid pro quo* sexual harassment, a plaintiff must demonstrate that she suffered a tangible employment action as a result of her refusal to submit to

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[3] Specifically, the Third Circuit majority relied upon *Asbill v. Housing Auth. of the Choctaw Nation*, 726 F.2d 1499 (10th Cir. 1984), where the Tenth Circuit opined that *Baldwin*'s holding does "not paint with as broad a brush as appears from" this Court's language, such that a harmless error analysis could be applied in reviewing a general verdict rendered on multiple claims where one claim was erroneously submitted to the jury. However, as Judge Cowen posited in his dissent, *Asbill* "no longer represents the prevailing view of the Tenth Circuit." (App. 90, 174 F.3d 137 n.4)

sexual advances. (App. 83, 174 F.3d at 134) Here, in Judge Cowen's view, the jury instruction was legally flawed because it permitted the jury to impose liability on a *quid pro quo* theory of liability upon a finding of only an unfulfilled threat. (App. 84, 174 F.3d at 134) Thus, the dissent opined, because the jury's general verdict rested on a flawed theory of *quid pro quo* liability, it must be reversed. (App. 87, 174 F.3d at 134-35)

The dissent rejected the panel's newly created "harmless error" analysis to affirm the general verdict, pointing out that the panel's ruling was contrary to *Baldwin* and its progeny, as well as prior Third Circuit law, and conflicted with the law of other circuits. (App. 87-89, 174 F.3d at 135-36) Judge Cowen emphasized that the trial evidence was "hotly contested" and that it is impossible to determine what led the jury to reach its general verdict. (App. 91, 174 F.3d at 137) Finally, the dissent emphasized that the implications of the panel's harmless error analysis go well beyond this case:

> **" . . . I am very concerned that the majority's newly-minted harmless error analysis will invite further efforts by appellate judges, in even more difficult cases, to divine what a jury may have been thinking when it rendered a general verdict. . . . I believe that we have no role in speculating how a jury might have viewed the evidence presented at trial, and that such attempts at judicial telepathy are unwise and contrary to our precedents. . . . "**

(App. 193-94, 174 F.3d at 138 (emphasis added))

REASONS FOR GRANTING THE WRIT

I

THE THIRD CIRCUIT HAS CREATED AN IMPORTANT, DANGEROUS, AND NOVEL TITLE VII PRECEDENT IN ITS USE OF HARMLESS ERROR ANALYSIS TO AFFIRM A JURY'S GENERAL VERDICT OF SEXUAL HARASSMENT LIABILITY

A Writ of Certiorari should be granted to review the Third Circuit's decision so as to ensure fair and consistent review of general verdicts which rest on defective legal theories of liability.

This review is especially important in the context of sexual harassment cases where juries must be instructed pursuant to the new *quid pro quo* standards of *Burlington Industries, Inc. v. Ellerth*. The Third Circuit's opinion in this case raises a novel and important issue in the ever-increasing jurisprudence of Title VII sexual harassment liability. There is no decision by any Circuit, let alone by this Court, that directly addresses the propriety of applying the federal harmless error doctrine in the circumstances of this sexual harassment case.

The importance of the decision below, as well as the need for this Court's guidance on the use of the harmless error doctrine in these circumstances, are highlighted by Judge Cowen's dissenting views. The dissent has demonstrated his deep concern "that the majority's newly-minted harmless error analysis will invite further efforts by appellate judges . . . to divine what a [sexual harassment] jury may have been thinking when it rendered a general verdict [of sexual harassment liability]," where

one of the jury instructions on liability was both legally and factually wrong. (App. 93-94, 174 F.3d at 138)

The time for this Court to settle this Title VII matter is now, for the harmless error issue has been fully developed in this case and the danger of other Circuits adopting or expanding upon the Third Circuit's analysis is very real, particularly because of an already existing Circuit conflict regarding the use of a harmless error analysis for general verdicts outside of the Title VII context. Neither the alleged sexually harassed victim nor the victim's employer should be forced to wait until a full-blown Circuit conflict has developed.

Thus, the issue, in its simplest form, is whether this Court's seminal decision in *Maryland v. Baldwin*, 122 U.S. 490 (1884), should be applied to Title VII proceedings.

The overarching error in the panel majority's decision was its determination that the jury's general verdict of sexual harassment against the ACPD, based on a legally and factually defective *quid pro quo* theory of liability, should be affirmed. That decision radically departs from the entire body of United States Supreme Court, including the seminal case of *Maryland v. Baldwin*, which stands for the settled principle that a general verdict cannot stand where it rests upon an improper legal ground. By highlighting sexually crude, sensational evidence, the majority rationalizes a new harmless error analysis to circumvent what the dissent below aptly described as the rule applied by this Court "without exception" since *Baldwin* – i.e., that a general verdict returned on an erroneous charge must be reversal since

"the general verdict's 'generality prevents us from perceiving upon which plea [the jury] found.' " (App. 88-89, 174 F.3d at 136) Such a drastic departure from existing law in a case involving newly defined *quid pro quo* standards merits this Court's attention.

1. The Jury Instruction on *Quid Pro Quo* Liability Was Legally Defective

In *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), this Court addressed whether a *quid pro quo* sexual harassment claim may be stated where the plaintiff has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible job detriment. The Court held that because the claim involved only unfulfilled threats, it should be characterized as a hostile work environment claim. *Id.* at 2205. Accordingly, to prove *quid pro quo* sexual harassment, a plaintiff must demonstrate either that she submitted to the sexual advances of her harasser or that she suffered a tangible employment action as a result of her refusal to submit to those sexual advances.

In the instant matter, with respect to *quid pro quo* liability, the District Court charged: "the plaintiff must prove . . . that someone with supervisory authority over her engaged in conduct that conditioned tangible job benefits . . . on submission to unwelcome sexual conduct or penalized her for refusing to participate in such conduct." (A5280) Thus, contrary to *Ellerth*, the instructions did not require that plaintiff prove that she actually suffered a "tangible job detriment" as a result of her refusal to submit to her supervisor's advances.

The panel majority acknowledged the obvious "possibility" that the instruction improperly permitted the jury to impose liability for *quid pro quo* sexual harassment upon a finding that a supervisor conditioned a tangible job benefit on plaintiff's submission to a sexual demand, even if the supervisor never actually penalized plaintiff for her failure to submit. Because imposing liability for such unfulfilled threats is incompatible with *Ellerth*, the instructions herein were legally erroneous.[4]

2. Application Of Harmless Error Analysis Where There Is A Tainted General Verdict Is Contrary To The Law Of This Court

After acknowledging that the jury charge on *quid pro quo* was both legally and factually defective, the majority then brushes aside a long line of precedent holding that a general verdict which rests on a legally defective theory of liability requires reversal. It does this by relying on an anomalous Tenth Circuit decision (*see supra* note 3) for the proposition that this Court's precedent "does not speak to the harmless error situation." (App. 51, 174 F.3d at 121) As recognized by the dissent, however, the majority's

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[4] As the dissent below pointed out, in addition to legal error in the charge, there was also no factual basis to submit a *quid pro quo* charge to the jury. There was simply no evidence that Hurley suffered any tangible job detriment as a result of her failure to submit to Madamba's advances. (App. 84-86, 174 F.3d at 134-35) The majority panel conceded as much by describing the *quid pro quo* claim as the "least tenable" of Hurley's and the evidence of retaliation for refusal to submit as "gossamer." (App. 49, 174 F.3d at 120 & n.19)

newfound harmless error analysis is not supported by this Court's precedents:

> The Supreme Court has been . . . consistent in holding that a general verdict in a civil case must be reversed if any of the claims submitted to the jury are found to be unsound. (App. 88, 174 F.3d at 136)

This Court's decisions have been definitive and unqualified on this point since it first declared over a century ago that a general verdict cannot stand where it rests on a faulty theory of liability in *Maryland v. Baldwin*, 112 U.S. at 493 ("If . . . upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld. . . . "). As Judge Cowen noted, this Court's precedents make clear that reversal was required "without exception." (App. 89, 174 F.3d at 136) *See, e.g., Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78-79 (1907) (reversing judgment in favor of plaintiff in accordance with *Baldwin* where jury returned general verdict on several claims, some of which were unsupported by any evidence and thus erroneously charged to the jury).

This Court has reaffirmed the *Baldwin* rule on repeated occasions in civil cases, although never in a Title VII context.[5] Harmless error was never considered. For

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[5] This Court long ago drew a distinction between civil and criminal cases in addressing the proper review of error in respect to general verdicts. *Wilmington Star Mining Co.*, 205 U.S. at 78 (applying *Baldwin* principle in reviewing general verdict in civil case, and noting "of course, in a case like the one we are considering we cannot maintain the verdict, as might be done in

example, the *Baldwin* principle was affirmed without any consideration of harmless error principles in *United New York and New Jersey Sandy Hook Pilots Assoc. v. Halecki*, 358 U.S. 613 (1958). There, plaintiff brought an action for negligence and unseaworthiness and the jury returned a general verdict against the defendant. On appeal, this Court found that it was legal error to instruct the jury on the doctrine of unseaworthiness. Applying the *Baldwin* principle, the Court reversed: "there is no way to know that the invalid claim . . . was not the sole basis for the verdict." *Id.* at 619.

The same result obtained in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), an action brought under the Sherman and Clayton Acts for conspiracy and antitrust violations. Because this Court found legally erroneous one theory of liability upon which the jury's general verdict was based, reversal was required.

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a criminal case upon a general verdict of guilty upon all counts of an indictment."). Even in the criminal context, however, the harmless error doctrine does not apply where the error affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). *See also Neder v. United States*, 119 S. Ct. 1827, 1833 (1999).

Here, petitioner is prepared to argue that (1) the criminal law analysis of the harmless error doctrine should not govern a civil sexual harassment case; rather, the *Baldwin* analysis should govern; and (2) even under the criminal law approach, the error in the *quid pro quo* allegations substantially affected the whole "framework" of the trial, culminating in the factually and legally erroneous jury instruction and tainted general verdict.

The Court's most recent affirmance of the *Baldwin* rule is *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 384 (1990), a case conveniently ignored by the panel majority. There, the Court reversed a general verdict against defendants for violations of the Sherman Act which rested on a theory of liability that the Court found was subject to immunity from the federal antitrust laws. Relying on *Sunkist Growers*, the Court reasoned that "the verdict . . . cannot be permitted to stand since it was based on instructions that erroneously permitted liability for [protected activity]." *Id.* at 383.

The Third Circuit has departed from the principles articulated by this Court in *Baldwin* and its progeny. Its decision is likely to cause confusion on the application of the *Baldwin* principle, particularly in Title VII sexual harassment cases. Plenary consideration by the court on this issue is essential, either to reaffirm *Baldwin* or to articulate the proper manner of appellate review of general verdicts rendered on erroneous legal instructions.

II

THE THIRD CIRCUIT'S USE OF THE HARMLESS ERROR DOCTRINE IN REVIEWING A GENERAL VERDICT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The decision of the Third Circuit in this case conflicts with decisions in other Circuits, among which there was already considerable confusion regarding when an error in one of several theories underlying a general verdict may be found to be harmless error. The majority of the Third Circuit held that where it is "highly probable"

(App. 50, 174 F.3d at 121), although not necessarily certain, that the error in one charged theory did not affect the general verdict, it can be sustained as harmless error.

As noted by Judge Cowen in his dissent below, the Third Circuit majority's opinion conflicts with decisions of other Circuits. For example, the Third Circuit's disposition conflicts with the view of the Tenth Circuit which insists that where the general verdict rule applies, the error cannot be held harmless, even if it is "very unlikely" that prejudice resulted, unless there is "absolute certainty" that the jury was not influenced by the erroneous instruction. *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1300-01 (10th Cir. 1989). *See Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1229-31 (10th Cir. 1996) (citing *Farrell* and holding that reversal is required even if possibility of prejudice is "remote."). The First Circuit is in accord with this position. In *Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996), the First Circuit stated that reversal is required in a general verdict situation if the error "*may* have affected the verdict." *Id.* at 468 (emphasis added).

There is also a multiplicity of views among the other circuits as to the application of the general verdict rule. Contrary to the decisions cited from the Tenth Circuit, the Second Circuit has expressly stated that absolute certainty is *not* required, and that it will uphold a general verdict whenever the appellate court is "sufficiently confident that the verdict was not influenced by an error in the jury charge." *Bruneau v. South Kortright Central School District*, 163 F.3d 749, 759-60 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 2020 (1999). This comports with the views of the Fourth, Fifth and Eighth Circuits which have stated that

they will apply the harmless error rule to affirm a general verdict where the appellate court is "reasonably certain" that the error was harmless. *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192-93 (4th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); *Imperial Premium Finance, Inc. v. Khoury*, 129 F.3d 347, 354 (5th Cir. 1997); *Dakota Indus., Inc. v. Ever Best Ltd.*, 28 F.3d 910, 912 (8th Cir. 1994).

Other Circuits take still different approaches. In *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772 (9th Cir. 1990), the Ninth Circuit, over a vigorous dissent by Judge Kozinski, announced that a reviewing court, in its "discretion" (which discretion is controlled by consideration of four factors), could uphold a general verdict by "construing it] as attributable to one of several theories if it was supported by substantial evidence and was submitted to the jury free from error." *Id.* at 777. The Ninth Circuit later reaffirmed this rule, though recognizing that it "has been the target of vigorous and persuasive criticism." *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1439 (9th Cir. 1996).

The Seventh Circuit takes a position exactly opposite to that taken by this Court in *Baldwin*; in reviewing general verdicts rendered on multiple legal theories, the Seventh Circuit will uphold the verdict so long as at least one theory was legally correct and supported by the evidence. *See Bandura v. Cross Exterminating Co.*, 865 F.2d 816, 821-22 (7th Cir. 1988); *McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir.), *cert. denied*, 454 U.S. 835 (1981). Judge Kozinski has called this a "maverick" position which "contravenes Supreme Court authority." *Kern*, 899 F.2d at 790-91 (Kozinski, J., dissenting.)

There are thus currently no fewer than *five* different approaches among the Circuits regarding when an error in a general verdict can be held harmless. These divergent approaches result in different appellate outcomes based on the mere happenstance of which Circuit hears the appeal. This Court should grant certiorari to resolve this wide-ranging conflict and provide much needed guidance to the lower courts on this important issue.[6]

III

THERE WILL BE NO CONSERVATION OF JUDICIAL RESOURCES BY APPLICATION OF THE HARMLESS ERROR RULE HERE

As demonstrated in the dissenting opinion below, the application of the harmless error rule here fails to further the very purpose of the rule's existence: conservation of judicial resources. *United States v. Hasting*, 461 U.S. 499, 509 (1983). *See also* 11 Wright & Miller, *Federal Practice and Procedure*, § 2881 at 443 (2d Ed. 1995) ("The theory of the

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[6] Commentators have also called upon this Court to resolve this Circuit conflict. *See, e.g.*, David M. Axelrad and Loren Homer Kraus, "The Federal General Verdict Rule: Conflict in the Courts of Appeal," 43 *Federal Lawyer* 43, 44 (June 1996) (discussing the conflict in the Circuits and the incompatibility of the harmless error test in the face of this Court's "unqualified rule requiring reversal of general verdicts in civil cases involving error," and requesting that this Court intervene to articulate a clear, uniform standard to guide the lower courts); Elizabeth Cain Moore, Note, "General Verdicts in Multi-Claim Litigation," 21 *Mem. St. U. L. Rev.* 705 (1991) (also discussing the Circuit conflict and calling for this Court to intervene and set forth a uniform standard).

harmless-error rule generally is that procedure is a practical means to an end, the requirements of which should be not more exacting than efficiency requires."). Indeed, Judge Cowen cautioned that "[t]he invocation of the harmless error rule in this case is particularly misguided because it will produce no benefit to either the judicial system or the parties." (App. 93, 174 F.3d at 138)

Here, given the limited affirmance of the compensatory verdict portion of the verdict against the ACPD only and the reversal of the judgment as to two of the individual defendants, the entire case will have to be represented to a jury. That is, there will be a new trial as to the individual defendants and to the ACPD as to punitive damages under New Jersey law. To evaluate those claims, all of the evidence underlying the compensatory claim will need to be introduced. The whole case will effectively be tried again.

Thus, no judicial resources will be saved by the affirmance of the compensatory award. The purpose of the harmless error rule will not be advanced by its application in this case.

CONCLUSION

For all of the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

DENNIS M. TUOHY
TUOHY, TUOHY & BLEE
20 S. Tennessee Avenue
Atlantic City, NJ 08401-7138
(609) 345-0005
Counsel of Record for Petitioner
Atlantic City Police Department

Of counsel:

EUGENE GRESSMAN
University of North Carolina
School of Law
Chapel Hill, NC 27599-3380
(919) 962-3688

Dated: September 8, 1999

Volume 1 of 2

Filed March 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-5633, 96-5634, 96-5661, 96-5738

Sergeant Donna M. HURLEY; PATRICK K. HURLEY,
husband and wife,

v.

The ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
JOHN MOONEY; JOHN DOES 1 THROUGH 50
inclusive, fictitious name defendants, jointly,
severally, and in the alternative

(Camden New Jersey District Civil No. 93-260).

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
wife and husband,

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
JOHN MOONEY; JOHN DOES 1 THROUGH 50,
inclusive, jointly, severally, and in the alternative

(Camden, New Jersey District Civil No. 94-1122),

Atlantic City Police Department,
Appellant No. 96-5633.

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
husband and wife,

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
JOHN MOONEY; JOHN DOES 1 THROUGH 50.
inclusive, fictitious name defendants, jointly,
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(Camden New Jersey District Civil No. 93-260).

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
wife and husband

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
JOHN MOONEY; JOHN DOES 1 THROUGH 50,
inclusive, jointly, severally, and in the alternative

(Camden, New Jersey District Civil No. 94-1122),

Henry Madamba,
Appellant No. 96-5634.

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
husband and wife,

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
JOHN MOONEY; JOHN DOES 1 THROUGH 50,
inclusive, fictitious name defendants, jointly,
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(Camden New Jersey District Civil No. 93-260).

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
wife and husband

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THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
JOHN MOONEY; JOHN DOES 1 THROUGH 50,
inclusive, jointly, severally, and in the alternative

(Camden New Jersey District Civil No. 94-1122),

Donna M. Hurley, and Patrick K. Hurley,
Appellants No. 96-5661.

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
husband and wife,

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
JOHN MOONEY; JOHN DOES 1 THROUGH 50,
inclusive, fictitious name defendants, jointly,
severally, and in the alternative

(Camden New Jersey District Civil No. 93-260).

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
wife and husband

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
JOHN MOONEY; JOHN DOES 1 THROUGH 50,
inclusive, jointly, severally, and in the alternative

(Camden, New Jersey District Civil No. 94-1122),

Donna M. Hurley, and Patrick K. Hurley,
Appellants No. 96-5738.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Nos. 93-cv-00260, 94-cv-01122)
Argued May 4, 1998.
Reargued Oct. 5, 1998.

BEFORE: BECKER, Chief Judge, SCIRICA and COWEN,
Circuit Judges

(Filed March 18, 1999)

Clifford L. Van Syoc, Esq. (Argued)
Van Syoc Law Offices
200 Lake Drive East, Suite 110
Woodland Falls Park
Cherry Hill, New Jersey 08002

Counsel for Plaintiffs-Appellees/
Cross-Appellants

Dennis M. Tuohy, Esq. (Argued)
Tuohy & Tuohy
20 South Tennessee Avenue
Atlantic City, New Jersey 08401

Counsel for Defendant-Appellant/
Cross-Appellee, Atlantic City
Police Department

Mark Falk, Esq. (Argued)
Barry & McMoran
One Newark Center, 18th Floor
Newark, New Jersey 07102

Counsel for Defendant-Appellant/
Cross-Appellee, Henry Madamba

Richard L. Goldstein, Esq. (Argued)
Marshall, Dennehey, Warner,
Coleman & Goggin
Three Greentree Center, Suite 304
Marlton, New Jersey 08053-3405

Counsel for Defendant/Cross-
Appellee, Nicholas V. Rifice

Thomas F. Bradley, Esq. (Argued)
Hankin, Sandson & Sandman
30 South New York Avenue
Atlantic City, New Jersey 08401

Counsel for Defendant/Cross-
Appellee, John J. Mooney

OPINION OF THE COURT

BECKER, *Chief Judge.*

This is an appeal by defendants Henry Madamba and the Atlantic City Police Department (ACPD) from an amended judgment entered upon a jury's determination that Madamba discriminated against plaintiff Donna Hurley on the basis of her sex in violation of the New Jersey Law Against Discrimination (LAD), N.J. Stat. Ann. 10:5-1 *et seq.*, and that the ACPD discriminated against her on the basis of her sex in violation of the LAD and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.* Donna Hurley cross-appeals from an amended judgment entered upon the jury's determination that defendant Nicholas Rifice did not discriminate against her in violation of the LAD. She also cross-appeals from the district court's order granting defendant

John Mooney's motion for summary judgment and the district court's order denying her motions for prejudgment interest and an additur and granting her motion for attorney's fees subject to a reduced hourly rate. In addition, plaintiff Patrick Hurley appeals from the district court's order granting defendants' motion for summary judgment on his loss of consortium claim.

Because the harassing conduct tolerated by the ACPD was longstanding and egregious, and because the trial court did not commit reversible error in its evidentiary decisions or its jury instructions, we will affirm the amended judgment insofar as it imposes liability and compensatory damages on the ACPD. However, because the punitive damages instructions did not require actual participation by upper management or willful indifference as required by New Jersey law, we will vacate the amended judgment to the extent it imposes punitive damages against the ACPD and order a new trial on that issue.

Our recent decision in *Failla v. City of Passaic*, 146 F.3d 149 (3d Cir. 1998), set forth our understanding of liability for aiding and abetting under the New Jersey LAD. In light of *Failla*, it is evident that the jury instructions on aiding and abetting erred in two critical respects. We will therefore reverse the amended judgment entered against Madamba because the instructions failed to require a finding that Madamba substantially assisted the harassment. We will also vacate the judgment entered in favor of Rifice because the instructions wrongly directed the jury to absolve Rifice unless he took affirmative harassing acts. However, we will affirm the district court's order granting Mooney's motion for summary judgment

because, as we understand New Jersey law, he could not, as a nonsupervisory employee, be liable for aiding and abetting the ACPD's failure to prevent and redress harassment even if he affirmatively harassed Donna Hurley. We will also affirm the district court's order denying plaintiff's motions for prejudgment interest and an additur and granting plaintiff's motion for attorney's fees subject to a reduced hourly rate.[1]

I. Facts and Procedural History[2]

Plaintiff Donna Hurley has been an officer with the ACPD since February of 1978. She joined the force shortly after becoming the first female graduate of the Atlantic City Police Academy. Her husband, plaintiff Patrick Hurley, is also an officer with the ACPD. For purposes of clarity, we will refer to Donna Hurley as "Hurley," to Patrick Hurley as "Mr. Hurley," and to Mrs. and Mr. Hurley collectively as the "Hurleys" or "plaintiffs." The Hurleys met while training at the Police Academy and married in 1980. Hurley alleges that she was subjected to sexual harassment as early as her training at the Police Academy in the late 1970s. In 1981 her then-supervisor, Sergeant Walter Reay, harassed her by making sexually derogatory comments about her hygiene during roll call, disturbed her while she was changing in the drill room, spoke to her in condescending tones during radio transmissions, and held her to stricter standards than male

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[1] The district court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343, and 1367. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

[2] The facts recited were all adduced at trial.

officers. During that year, fellow officers allegedly referred to Hurley as "the cunt" and placed a tampon and a copy of *Hustler* magazine in her squad car.

Despite these and other obstacles,[3] Hurley was promoted in November of 1987 and became the first female sergeant at the ACPD. Although her title changed as a result of this promotion, Hurley claims that her assignments continued to be menial and provided no useful experience. At one point, for example, Hurley was assigned to the Juvenile Truancy Task Force, where her job was to keep statistics on juvenile truants and where, although a sergeant, she supervised no one.

The ACPD divides its officers into three shifts: 8:00 a.m. to 4:00 p.m., or "Alpha Platoon"; 4:00 p.m. to 12:00 midnight, or "Bravo Platoon"; and midnight to 8:00 a.m., or "Charlie Platoon." After working approximately two years as a sergeant on Alpha Platoon, Hurley was transferred in January 1990 to desk sergeant of Charlie Platoon, where she came under the direct command of defendant Captain Henry Madamba. The events at the

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[3] In addition to the harassment, Hurley testified that, prior to January of 1987, she was given "lowly positions that offered no useful experience or potential for advancement." *Hurley v. Atlantic City Police Dep't*, 933 F. Supp. 396, 405 (D.N.J. 1996). For example, she testified that she was assigned to the Records Bureau to perform menial copying tasks. *See* App. at 2420. She also testified that she was assigned to security desk duty, which consisted of signing civilians in and out of the department building, and fire watch, which consisted of watching one particular building for an outbreak of fire. Hurley did not, however, include a failure to train or promote claim in her complaint.

core of this case occurred while Hurley worked in Charlie Platoon. During her first week on this assignment, Madamba allegedly told plaintiff that upper management sent a woman to his unit to "break his balls," and that he "did not expect [her] to be here on this shift very long." App. at 2749-50. Madamba also allegedly advised Hurley to request a hardship transfer out of Charlie Platoon and gave a male officer with less seniority a more favorable schedule.

Hurley testified that she was sexually harassed throughout her entire tour on Charlie Platoon by her superiors and her coworkers. This harassment included "keying out" her radio transmissions,[4] demeaning comments by Madamba during roll call, and exclusion from sergeants' meetings. In addition, officers placed a sanitary napkin with sergeant's stripes over the roll call podium and affixed a dildo either to the wall or the podium in the roll call room. Finally, she was the subject of sexually explicit graffiti and drawings of herself at three locations on city property: the roll call room, the roll call bathroom, and the bathroom of the Masonic Temple, a building used by both employees and the public. Several of the most egregious examples of the offensive material, of appallingly low character, are set forth in the margin.[5]

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[4] "Keying out" or "clicking out" consists of depressing the "On" and "Off" buttons of a radio transmitter to block the communications of the officer who is using the airway.

[5] Hurley was compelled to attend roll call in front of a life-size drawing of herself performing oral sex as her supervisor, Madamba, sat eight feet away. In addition, the following graffiti

Hurley also testified that Madamba personally harassed her while she was on Charlie Platoon. In addition to the insults he directed at her during roll call and his decision to exclude her from sergeants' meetings, Captain Madamba allegedly refused to take action against officers who "keyed out" plaintiff's radio transmissions, and told her that she was "too emotional" about the sanitary napkin incident. At one point, he reacted to the latest sexually explicit graffiti by rushing to see it and laughingly informing Hurley, in front of her colleagues, that "it's really bad," but he took no action to remove or prevent the appearance of the graffiti. In September of 1990, he sent a

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appeared on a wall in the roll call bathroom, which was commonly used and open to the public:

> Oh sweet Donna Hurley
> With cunt hair so curley
> Your blond hair seems so soft and stays in place
> When I toss off my cookies in your face
> I'd like to stick my cock in your ass
> But when I think of Lt. Andros my cock gets soft fast
> So keep up your spirits and don't get depressed
> Cause even though your a cunt I'd like to press your flesh
> Though in uniform your rude and brass
> Your just another sex machine with my cock in your ass

Next to this was a graphic drawing of a naked women labeled "Donna Hurley" and bearing sergeant's stripes. Near the drawing, and apparently written by several different hands, were the scrawled phrases "just another fuck doll," "she should look this good." and "Lt. Andros was here." Lieutenant Andros was a co-worker with whom Hurley was rumored to have had an affair.

memorandum to defendant Rifice, an Inspector at the time, stating that Hurley had abused her sick leave. As a result, then-Chief of Police Robert McDuffie sent Hurley a memorandum requiring her to produce a doctor's note every time she took sick leave.

Hurley testified that when she complained to Madamba that the harassment at Charlie Platoon was becoming too much for her, he replied that women in the private sector are protected against such harassment because they "sleep with their bosses." App. at 2776-77. When she attempted to change the topic of conversation and commented on Madamba's apparent weight loss, he stated that he lost weight by "having sex a few times a day," and that women came to him "when they're ready." App. at 2498-2508. Hurley interpreted this entire conversation as a solicitation for sex.

Hurley also testified that another sergeant on Charlie Platoon, defendant John Mooney, sexually discriminated against her in two ways. First, Mooney made several sexually derogatory comments to her, some of which Madamba witnessed yet did nothing to stop. For example, Mooney remarked that he had heard that Hurley "liked it hard and stiff," and suggested that, when Hurley met with Police Captain McKenna, she was actually performing oral sex on him. *See* X App. at A2516, A2514. On another occasion, when Hurley was unable to locate her coffee mug, Mooney asked her if she wanted to drink out of his jock cup. *See id.* at A2514. Second, Mooney used his influence, which far exceeded his position as sergeant, to transfer Hurley to an undesirable assignment because of

her sex.[6] In particular, Hurley claims that Mooney was responsible for her transfer from her position as Court Liaison Officer to the Juvenile Truancy Task Force.

After Mr. Hurley's efforts to intervene on his wife's behalf failed, Hurley submitted a memorandum to Madamba on November 1, 1990, detailing the harassment she experienced during her tour on Charlie Platoon and requesting a transfer. Madamba forwarded Hurley's memo to the Chief of Police along with a memo of his own requesting that Internal Affairs conduct an investigation of Hurley for allegedly lying in the memo as part of a conspiracy to get money from the ACPD. No investigation along these lines was ever conducted.

Shortly thereafter, Hurley was transferred to the Alpha Platoon shift of the Property and Evidence Unit. Although she had requested a transfer out of Charlie

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[6] Although Hurley and Mooney shared the same rank at that time, she alleges

> that Mooney had obtained power far beyond that which would otherwise be expected to be held by a mere sergeant. As a result of his years of acting as the former chief's aid and confidant, the political prominence of his councilman father, the high position of his brother-in-law, Inspector Polk, who is married to Mooney's sister, Captain Michelle Polk, and the widespread perception in the department that Mooney was destined to become the Chief, Mooney was in a position to abuse his real authority without fear of consequences.

Appellee's Br. at 37.

Platoon, Hurley alleges that this particular transfer constituted retaliation for her sexual harassment memorandum because the Property and Evidence Unit was widely regarded as an undesirable position, and the Alpha Platoon was incompatible with the personal schedule to which she had become adjusted while working on Charlie Platoon. Hurley also alleges that when she was transferred to the Property and Evidence Unit, she was denied a three percent pay increase that ACPD officers receive when transferred to plain clothes duty. She eventually received this increase on April 20, 1993, retroactive to November 8, 1990. Hurley contends that the harassment continued even after she left Charlie Platoon.

For example, the graffiti apparently remained on the walls well after her transfer. Rifice, who had been promoted to Police Chief, testified at trial that he heard complaints about the graffiti as late as March of 1992, and Mr. Hurley took photographs of the graffiti in the summer of 1992. In addition, an EEOC investigation concluded that there was sexual graffiti in Hurley's work area as late as June of 1993. Moreover, on June 13, 1992, while Hurley was attending a police seminar, Mooney, then Captain of Charlie Platoon, allegedly approached her and called her "the ass up from the Property Room" in front of two other sergeants.

Hurley further avers that the Chief of Police, defendant Rifice, was aware of her plight and failed to take steps to protect her and discipline the perpetrators. She also testified that Rifice personally committed several affirmative acts of sexual discrimination against her. These acts included: (1) transferring her to the Property and Evidence Unit; (2) denying her access to Chief

McDuffie; (3) denying her a three percent pay raise when she transferred to plainclothes duty; (4) denying her request for funeral leave; and (5) condoning an improper Internal Affairs investigation into her conduct while she was assigned to the Property Room.

Hurley worked continuously until July 26, 1994, after which she went on an extended paid sick leave. She asserts that, as a result of the harassment, she has suffered severe emotional distress that has interfered with her work, her personal life, and her family life. Mr. Hurley alleges that the harassment has detrimentally affected his relationship with his wife.

On July 10, 1992, Hurley filed complaints with both the United States Equal Employment Opportunity Commission (EEOC) and the New Jersey Department of Law and Public Safety, Division of Civil Rights (DCR). Both complaints named the ACPD as the sole respondent and alleged that Hurley had been harassed while on Charlie Platoon. Hurley submitted an affidavit in connection with her EEOC complaint alleging that Madamba and Mooney harassed her during her tour on Charlie Platoon. She claimed that obscene drawings of her remained visible as late as March of 1992, and that her transfer to the Property and Evidence Unit and denial of the three percent pay raise were in retaliation for her complaints of sexual harassment.

On January 30, 1993, before the EEOC had issued plaintiff a right to sue letter pursuant to 42 U.S.C. § 2000e-(f)(1), the Hurleys filed the district court complaint which stated all of Hurley's instant claims. Subsequently, on October 12, 1993, the EEOC issued a

determination on Hurley's charge. The EEOC investigator found probable cause to believe that Hurley had been sexually harassed while she was on Charlie Platoon, but no probable cause on retaliation charge regarding the transfer to the Property and Evidence Unit and the denial of the three percent pay increase. On March 7, 1994, the Hurleys filed a second complaint. This complaint relied on the facts stated in the previous complaint and alleged discrimination pursuant to 42 U.S.C. § 2000e-2 and retaliation pursuant to 42 U.S.C. § 2000e-3(a). The district court subsequently consolidated these two complaints.[7]

Following extensive discovery, each of the defendants moved for summary judgment. The district court granted Mooney's motion for summary judgment, and dismissed all claims against Madamba and Rifice with the exception of Hurley's aiding and abetting claims under the LAD. Additionally, the court dismissed all claims against the ACPD except for Hurley's hostile work environment claim under Title VII, Section 1983, and the LAD.

The jury trial lasted more than two months. At the conclusion of the liability portion of the trial, the jury rendered a verdict against Madamba and the ACPD but found Rifice not liable. The jury awarded $575,000 in compensatory damages and awarded punitive damages against the ACPD but not against Madamba. A punitive damage hearing was conducted before the jury, at the end of which the jury awarded Hurley $700,000 in punitive damages.

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[7] We note that the Hurleys' retaliation claims, arising from the ACPD's acts after this lawsuit was filed, are not part of this appeal.

The ACPD and Madamba moved for judgment as a matter of law or, in the alternative, a new trial or a remittitur. Hurley moved for a new trial as to Rifice, and an additur with respect to the entire damages award. In addition, Rifice and Mooney, as well as Hurley, moved for attorneys' fees and costs.

The district court denied defendants' motion for a new trial and for a remittitur as to punitive damages and also denied plaintiff's motion for an additur. However, the court granted defendants' motions for a remittitur with respect to the compensatory damages award, which the court remitted to $175,000. The court also denied the defendants' fee petitions, but granted plaintiff's petition, subject to a reduced hourly rate and the exclusion of hours spent in pursuit of unsuccessful claims. Hurley accepted the remittitur, and the court awarded counsel fees and costs in favor of Hurley in the amount of $516,046 and $70,135, respectively. The court then entered an amended judgment. This appeal and cross-appeals followed.

II. The ACPD's Liability

The ACPD argues that it is entitled to a new trial for five reasons. First, it contends that the district court abused its discretion under Rule 403 of the Federal Rules of Evidence by admitting "highly inflammatory and largely irrelevant evidence regarding alleged misconduct at the ACPD to which the plaintiff was not exposed." ACPD's Br. at 2. Second, it contends that the district court's ruling that plaintiff's psychiatric expert could testify about a second diagnosis that was not contained in

his reports "result[ed] in prejudicial surprise 'inconsistent with substantial justice.' " *Id.* at 40 (quoting *Conway v. Chemical Leaman Tank Lines, Inc.*, 687 F.2d 108, 111-12 (5th Cir. 1982)). Third, the ACPD asserts that the punitive damage award of $700,000 against it is so excessive that it creates an inference that the jury's liability verdict "resulted from its passion and prejudice toward the City of Atlantic City." *Id.* at 46 (citing *Dunn v. HOVIC*, 1 F.3d 1371, 1382 (3d Cir.) (en banc), *modified on other grounds*, 13 F.3d 58 (3d Cir. 1993)). Fourth, the ACPD claims that the district court's jury charge under the LAD was misleading, confusing, and contrary to the law. Finally, on reargument, which we held in the wake of the recently decided Supreme Court cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), the ACPD submits that these cases entitle it to a new trial on liability. We will address these arguments in turn.

A. Evidence Not Obviously Linked to Hurley's Experience in Charlie Platoon

During trial, and over defendants' objections, the district court permitted a number of witnesses to testify about alleged incidents of harassment and retaliation that were either remote in time from the "accrual date"[8] or

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[8] In its August 4, 1995 opinion and order, the district court concluded that the claims that formed the basis of plaintiff's sexual discrimination allegations began in late 1989 or early 1990, upon plaintiff's transfer to Charlie Platoon. App. at 5752. However, at the beginning of trial, the court expanded the time frame from which plaintiff could assert claims of sexual

involved matters of which Hurley was unaware until after she filed suit. This testimony can be divided into three categories: (1) testimony by four women who were associated with the ACPD about incidents of sexual harassment and retaliation of which Hurley had no knowledge until after commencing suit; (2) testimony by eight male police officers about "locker-room" conversations between men outside the presence of women; and (3) testimony by Patrick and Donna Hurley about several incidents of sexual harassment against Mrs. Hurley between 1978 and 1981.

The ACPD raises several arguments to support its contention that the district court abused its discretion by admitting this testimony. First, the ACPD points out that Hurley was unaware of most of these comments until after she filed suit. Thus, the comments could not possibly contribute to a hostile work environment for her. Second, it argues that it was impossible to rebut most of the alleged incidents at trial because they occurred at unspecified times and locations. Third, the ACPD asserts that incidents from 1978 to 1981 were too remote in time to be probative. Finally, the ACPD maintains that the

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discrimination to January 20, 1987, based upon the court's conclusion that such claims would have been within the six-year statute of limitations that the court found applicable to claims under the LAD. In *Montells v. Haynes*, 627 A.2d 654, 659 (N.J. 1993), the New Jersey Supreme Court adopted a two-year statute of limitations for claims under the LAD. However, the Montells court also held that its decision did not apply to cases pending at that time or to cases in which the operative facts arose before the date of the court's decision, *see id.* at 662, circumstances present here.

district court's limiting instructions regarding this evidence were insufficient to offset the unfair prejudice resulting from these rulings.

1. The Challenged Evidence

The district court permitted four women who had been associated with the ACPD to testify regarding the harassment of women within the department. Hurley did not witness any of these incidents, nor did she become aware of the alleged harassment until after she commenced suit.

Martha Donovan, a municipal prosecutor for the City of Atlantic City, testified about some mistreatment of Hurley that she had observed and also testified about an incident involving Sergeant Edward Yard of the ACPD. According to Ms. Donovan's testimony, in the summer of 1989 Sergeant Yard called Ms. Donovan a "cunt" and stated that he "ought to slap [her] face" for giving him an order; the incident occurred in front of fifty other people, including other police officers, in the hallway of the courthouse. *See* IV App. at A831. Donovan immediately complained to her supervisor and the officer ultimately apologized. At some point thereafter, Sergeant Yard's responsibilities were changed, and he had minimal contacts with Ms. Donovan thenceforth. Ms. Donovan never reported the incident to the ACPD supervisory staff.

Julia Cardy and Lisa O'Keefe, two civilian employees of the ACPD in the payroll department, testified that they were generally dissatisfied with their male ACPD supervisors. Ms. Cardy testified that in 1992, as a result of

reporting her supervisor, Sergeant Griggs, to his immediate supervisor, Captain MacDonald, for his misbehavior, she was retaliated against and subjected to chauvinistic remarks. Ms. Cardy further testified that women were treated "pretty poorly" if they "spoke out" against the mistreatment. V App. at A1166, A1171. Ms. O'Keefe stated that Sergeant Griggs and Captain MacDonald treated her with disrespect over a long period of time extending to at least 1992, when there was apparently some ill-feeling towards female employees as a result of Hurley's lawsuit. *See* IV App. at A858-60. She also testified that complaints to Rifice received no response, *see id.* at A862, although she ultimately filed a union grievance and the offending officers were removed from authority over the payroll department.

Officer Deborah Rando of the ACPD testified about the derogatory and sexually demeaning statements made to her in 1992 by her supervisor, defendant Mooney. At one point, Mooney referred to her conduct in profane terms and, when she objected, informed her that no one would believe her if she complained. *See id.* at A943. Despite this, she did complain to Mooney's supervisor, who warned her to think about her career and told her not to repeat her allegations to anyone. *See id.* at A948-50.

The district court permitted eight male police officers from the ACPD to testify at trial about derogatory comments made about women generally. These officers testified that, at least from 1990 to the time of trial, women were commonly referred to as "cunts," "douche bags," "broads," "bitches," and, as a group, "the crack troop." App. at A413, A768. In addition, one officer testified that most inspectors and captains commonly referred to

Hurley as "the whacky [sic] cunt." *Id.* at 443. These same officers testified, however, that these comments were always made outside the presence of women. Hurley was unaware of these comments until after she commenced suit.

Finally, the district court permitted both Patrick and Donna Hurley to testify, over objection, about events occurring well before the January 20, 1987 accrual date. For example, Mr. Hurley testified about alleged acts of discrimination against his wife dating back to her tenure at the Police Academy in 1978. He also testified about comments allegedly made by Hurley's supervisor, Sergeant Walter Reay, between 1978 and 1980. Reay supposedly asked Hurley about her personal hygiene and made weekly comments during roll call.

Hurley also testified about various incidents that allegedly occurred in 1981, when she was a patrol officer and Louis Rivera was her partner. Hurley testified that she "heard" that she was referred to as a "cunt." *Id.* at 2388-90. The court also permitted her to testify that, during 1981, a *Hustler* magazine was left on her patrol car seat and a tampon was hung from her rear view mirror.

2. *Admissibility of the Evidence*

In the district court's view, all of the evidence was admitted for the same purpose: to "permit[ ] the jury to more intelligently evaluate the evidence that did create liability." *Hurley*, 933 F. Supp. at 411. The court reasoned that permitting

> evidence of other women's experiences at the ACPD, of the attitudes of male officers towards women generally, and of Hurley's experiences prior to 1987 served several important purposes in this trial. It allowed the jury to gain insight into the motives, attitudes, and intentions of the defendants. It gave them the opportunity to evaluate the adequacy of management's response to Hurley's complaints during the statutory period. It provided the jury with a sense of whether the events that took place during the statutory period were anomalous or accidental, or instead were part of a "pervasive and severe" pattern.
>
> Plaintiff's treatment during the statutory period was unquestionably influenced by and related to her treatment throughout the course of her career at the ACPD. Plaintiff's experience was reflective of the general attitudes of the men around her; those attitudes also influenced, and were revealed in, the treatment of other women in the ACPD.

Id.

Although the district court believed that evidence of past harassment was "crucial to the jury's evaluation of the work environment at the ACPD," *id.* at 410, the court instructed the jury not to consider the evidence directly for purposes of liability. *See id.* at 411. Specifically, the court stated:

> You are to consider whether each defendant has engaged in sexual discrimination for the period from January 20, 1987, through January 20, 1993. You may consider evidence from before and

> after these dates to help you evaluate the defendants' conduct from January 20, 1987, through January 20, 1993, but liability attaches, if at all, only to defendants' conduct during this period.

Id. (alteration removed). The court believed that, "[b]y admitting the evidence but forbidding the jury to consider it as directly relating to liability, [it was] able to balance the interests of the plaintiff and the defendants." *Id.* In addition, the court instructed the jury that, in determining whether or not a hostile work environment existed, it could only consider conduct that actually altered Hurley's own work environment during the relevant period. *See* App. at A5278.

The evidence issues fall largely within the ambit of Federal Rule of Evidence 401, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."[9] Rule 401 does not raise

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[9] The parties have not argued that we need apply New Jersey procedure to the New Jersey claims, and we will apply the federal rules to both. *See Purgess v. Sharrock*, 33 F.3d 134, 139-40 (2d Cir. 1994); *cf. Wm. T. Thompson Co. v. General Nutrition Corp., Inc.*, 671 F.2d 100, 104 (3d Cir. 1982) (holding that the federal rule favoring admissibility of relevant evidence applies to state law claims in federal cases to which state law privileges might otherwise apply); *Salas by Salas v. Wang*, 846 F.2d 897, 905-06 (3d Cir. 1988) (discussing the standard for applying state evidentiary rules in pure diversity cases). Nor is there any indication that New Jersey admissibility rules differ in any relevant respect, as we think New Jersey's law recognizes the same principles we discuss in text. *See Rendine v. Pantzer*, 648 A.2d 223, 237-38 (N.J. Super. Ct. App. Div. 1994) (discussing the

a high standard. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782-83 (3d Cir. 1994). Also implicated in our discussion is Rule 403, which provides, in pertinent part, that "[relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . " We review evidentiary rulings for abuse of discretion, *see Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 132 (3d Cir. 1997), with substantial deference under Rule 403.[10] We conclude that the district court did not abuse its discretion under Rules 401 or 403 by admitting most of the challenged evidence, and that the error with respect to a portion thereof was harmless.

Evidence that women other than the plaintiff were subjected to a hostile work environment clearly meets Rule 401's requirements in a number of situations. For example, a plaintiff may show that, while she was not personally subjected to harassing conduct, her working conditions were nevertheless altered as a result of witnessing a defendant's hostility towards other women at the workplace. *See Lehmann*, 626 A.2d at 457 ("A woman's perception that her work environment is hostile to

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admissibility of evidence of discrimination against other people to prove motive or intent under N.J.R.E. 404(b)), *aff'd in relevant part*, 661 A.2d 1202, 1213 (N.J. 1995).

[10] We have held that a trial judge is given very substantial discretion when striking a Rule 403 balance, *see United States v. Eufrasio*, 935 F.2d 553, 572 (3d Cir. 1991), and that "a trial judge's decision to admit or exclude evidence under Fed. R. Evid. 403 may not be reversed unless it is arbitrary and irrational." *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 187 (3d Cir. 1990) (quotation marks omitted).

women will obviously be reinforced if she witnesses the harassment of other female workers.").

A plaintiff's knowledge of harassment or pervasively sexist attitudes is not, however, a requirement for admitting testimony on those subjects in a harassment suit. Evidence of harassment of other women and widespread sexism is also probative of "whether one of the principal nondiscriminatory reasons asserted by [an employer] for its actions was in fact a pretext for . . . discrimination." *Glass v. Philadelphia Elec. Corp.*, 34 F.3d 188, 194 (3d Cir. 1994); *see also Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995). In *Glass*, we found reversible error where the plaintiff attempted to introduce evidence of past racial harassment to explain negative evaluations and the trial court excluded it because it was time-barred. *Glass* relied on *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988), adopting its holding that circumstantial proof of discrimination, including evidence of past harassment and evidence of discrimination against others in the protected class, is admissible. Moreover, in Rule 403 terms, this evidence is highly probative, hence it is unlikely that any putative prejudice therefrom will be unfair or will outweigh its value.[11]

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[11] We note that, but for these precepts, clever discriminators might isolate each instance of discrimination and make it seem trivial or neutral. *See Glass*, 45 F.3d at 195; *see also Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (evidence of time-barred harassment and discrimination against others in the plaintiff's class was relevant); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1511 (11th Cir. 1989) (acts directed at others can be evidence of discrimination against the plaintiff). We also note apposite New Jersey

The principles established by our precedent apply to this case. Evidence of other acts of harassment is extremely probative as to whether the harassment was sexually discriminatory and whether the ACPD knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy. *See West v. Philadelphia Elec. Co.*, 45 F.3d 744, 752 (3d Cir. 1995). Neither of these questions depends on the plaintiff's knowledge of incidents; instead, they go to the motive behind the harassment, which may help the jury interpret otherwise ambiguous acts, and to the employer's liability. This kind of evidence is particularly important given the ACPD's main defenses at trial, which were that the incidents of abuse Hurley suffered were trivial horseplay to which both men and women were subjected and that its written sexual harassment policy was sufficient to insulate it from liability. Contrary to the ACPD's position, it is implausible in the extreme that Hurley was somehow immune from the pervasive sexism at the ACPD, as it was described by both female and male officers. *See Hurley*, 933 F. Supp. at 411; *see also Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632 (3d Cir. 1993) (holding that employees' remarks and racially derogatory notes sent by unidentified people were circumstantial evidence that management permitted an atmosphere of prejudice to infect the workplace).

The challenged evidence creates a basis for an inference that Hurley was targeted for abuse because she was

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precedent that a plaintiff may present evidence about the harassment of other women to establish employer liability. *See Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445, 462 (N.J. 1993).

a woman. It also gives reason to infer that the ACPD knew or should have known not only what was happening to its female officers but also, and most importantly, that the written sexual harassment policy was ineffective, and patently so. Indeed, it is hard to imagine evidence more relevant to the issue of whether a sexual harassment policy was generally effective than evidence that male officers did not respect it and that female officers were not protected by it.

Officer Rando and Ms. Cardy, for example, both testified about the dismissive and even retaliatory treatment they experienced when they reported male officers' misbehavior, and this was relevant, probative evidence that the ACPD was consistently insensitive to female employees' experiences of harassment. *See Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986) (evidence of frequent misconduct against plaintiff and others was "pertinent, perhaps essential" to the employer liability determination); *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C.Cir. 1985) (same), *aff'd sub nom. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 1986. This evidence remains highly relevant under *Ellerth* and *Faragher. See Faragher*, 118 S. Ct. at 2293 (discussing evidence of city's general failure to disseminate and enforce its sexual harassment policy in rejecting the availability of the affirmative defense in a particular case of harassment).

Aside from its relevance to the issue of whether the ACPD is liable for the hostile environment Hurley encountered, the evidence is also relevant to her intentional sex discrimination, *quid pro quo*, and retaliation claims. The general atmosphere of sexism reflected by the

challenged evidence is quite probative of whether decisionmakers at the ACPD felt free to take sex into account when making employment decisions, when deciding whether to abuse their positions by asking for sexual favors, and when responding to sexual harassment complaints. As *Glass* held, evidence of pervasive sexual harassment makes retaliation claims more credible, because harassers may be expected to resent attempts to curb their male prerogatives. *See Glass*, 34 F.3d at 195; *see also Hawkins v. Hennepin Technical Ctr.*, 900 F.2d 153, 156 (8th Cir. 1990).

Evidence of sexually derogatory and sexist harassment makes disparate treatment claims more credible as well, since such discriminatory acts stem from similar motives. *See Glass*, 34 F.3d at 192; *Josey*, 996 F.2d at 641; *Hawkins*, 900 F.2d at 155; *Hunter*, 797 F.2d at 1421. Other courts have found similarly with respect to quid pro quo claims. *See Heyne*, 69 F.3d at 1479-80; *Phillips v. Smalley Maintenance Servs., Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983); *Sowers v. Kemira, Inc.*, 701 F. Supp. 809, 816 (S.D. Ga. 1988). In this case, because of its high probative value, there was no abuse of discretion in admitting the challenged testimony from other officers.[12] Any putative

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[12] We also note that the alleged vagueness in the testimony, which the ACPD emphasizes, is limited to the testimony about general conditions in the ACPD and not to the many specific incidents to which the witnesses testified. This "vagueness" stems from the fact that male officers' misconduct was apparently so common as to blend into the background except when something particularly egregious occurred. The extent to which witnesses' inability to identify dates and places affected the witnesses' credibility could be, and was, addressed on cross-examination.

prejudice was not unfair, and at all events was outweighed by the probative value. Nor are any of the other Rule 403 factors present to counsel exclusion.

We do believe that evidence of events from 1979 to 1981 was improperly admitted because it was too distant in time from the events at the center of the ACPD's liability. Hurley did not claim a continuing violation from 1979 to 1992, and the district court abused its discretion when it admitted evidence from that distinct period in Hurley's career. We may find such error harmless only if "it is highly probable that the error did not affect the outcome of the case." *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 53 (3d Cir. 1989); *see also McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924, 927-28 (3d Cir. 1985).

In this case, the error was harmless. As the district court noted:

> This is a case where the plaintiff was compelled to attend roll call in front of a life-size drawing of herself performing oral sex as her supervisor, Madamba, sat eight feet away; where, in addition to pervasive graffiti directed at plaintiff, a sanitary napkin bearing sergeant's stripes dangled over the podium from which she spoke, and a dildo was affixed to a wall or ceiling nearby; and where plaintiff's professionalism and performance were constantly undermined because the men on the force could not tolerate a women among them. It is a case where the plaintiff's supervisor responded to plaintiff's entreaties by insinuating that he might be able to help her if only she would sleep with him.

Hurley, 933 F. Supp. at 413 (citations omitted). When viewed against the uncontestably relevant and admissible evidence, it is highly improbable that the improperly admitted evidence affected the judgment in this case. Indeed, were we to hold all of the evidence challenged by the ACPD inadmissible, we believe that its admission would still amount to harmless error, so clear is the evidence of the harassment Hurley experienced.

For the foregoing reasons, the ACPD's Rule 403-based evidentiary arguments fail.

B. Dr. Hoyme's "Surprise" Testimony

Dr. Hoyme, plaintiff's psychological expert, issued his first report on November 16, 1994. In that report, he wrote that "[m]y diagnosis [of Donna and Patrick Hurley] is Adjustment Disorder with mixed features of anxiety and depressed mood (309.28 DSM IV). . . . This diagnosis carries an implied causal connection between their traumatic experiences (sexual harassment, hostile work environment, and subsequent harassment) and their symptoms." App. at 5387. Subsequently, on February 20, 1995, Dr. Hoyme submitted another report in response to a report issued by defendants' psychological expert, Dr. Toborowsky. According to Dr. Hoyme's rebuttal report:

> Mrs. Hurley has experienced severe emotional injury and pain as the result of sexual harassment in the course of her work in the Atlantic City Police Department. Contrary to Dr. Toborowsky's stance, it is not necessary to prove that she has developed diagnosable psychiatric disorder in order to recognize or validate this substantial harm.

Id. at 5849.

On March 2, 1995, the magistrate judge ordered that Dr. Hoyme's rebuttal report be barred as untimely. Hurley appealed this decision to the district court, and the court initially upheld the magistrate's decision. The court also ruled, however, that Hurley could renew this motion at trial when the court "would have a better sense of the significance of the testimony." *Hurley*, 933 F. Supp. at 408. Hurley renewed her motion at trial, and the district court overruled the magistrate's decision "[b]ecause [the court was] concerned that the magistrate judge's sanctions against the plaintiff cut too close to the essential truthseeking function of the Court. . . . " *Id.* At trial, Dr. Hoyme testified about "another diagnosis that didn't neatly fit into the DSM criteria": a reaction to a "psychological assault." App. at 1667-68. He further testified that the defendants' conduct constituted an "aggressive attack on her" and a kind of "sexual assault" which caused severe pain comparable to a physical touching. *Id.* at 1726-29. In closing, Hurley's counsel also referred to Dr. Hoyme's "psychological assault" testimony as a basis for awarding damages.

The ACPD argues that Dr. Hoyme's reference to a "second diagnosis" regarding a "psychological assault" on Donna Hurley constituted unfair surprise because the testimony was materially different from that offered previously and provided the defendants with no meaningful opportunity for rebuttal. This unfair surprise, according to the ACPD, was "inconsistent with substantial justice" and warrants a new trial. We disagree.

A district court's decision to allow an expert to testify beyond the scope of his report is reviewed under an abuse of discretion standard. *See Greate Bay Hotel & Casino*

v. Tose, 34 F.3d 1227, 1236 (3d Cir. 1994). "We determine whether there has been an abuse of discretion by considering four factors: '(1) the prejudice or surprise in fact to the opposing party, (2) the ability of the party to cure the prejudice, (3) the extent of disruption of the orderly and efficient trial of the case, and (4) the bad faith or willfulness of the non-compliance.' " *Id.* (quoting *Beissel v. Pittsburgh & Lake Erie R. Co.*, 801 F.2d 143, 150 (3d Cir. 1986)).

We cannot conclude that the district court abused its discretion by permitting Dr. Hoyme's so-called "second diagnosis." First, notwithstanding Dr. Hoyme's rebuttal report, his initial report hinted strongly at this "second diagnosis," because it contained an explanation of the severe harm inflicted by the extensive sexual harassment Hurley experienced. Second, the defendants actually received the rebuttal report and were unquestionably aware of the appealability of the magistrate judge's order. Moreover, the defendants had several weeks after Dr. Hoyme's testimony to prepare rebuttal testimony and, thus, cure any possible prejudice. Indeed, Dr. Toborowsky testified that he had previously read both the deposition and courtroom testimony of Dr. Hoyme. Third, there was no need to call any witnesses out of order or any other disruptions at trial. Finally, while this evidentiary dispute might have been the product of "discovery-based bickering between the lawyers" and the "institutional differences between lawyers, who demand unvarying precision, and psychiatrists," *see Hurley*, 933 F. Supp. at 408, there is no evidence of bad faith.

C. *Inference of Jury Prejudice and Passion*

The ACPD contends that the $700,000 punitive damage award was the "product of the same abandonment of 'cool reason' in favor of 'outrage and disgust' which shocked the trial court's conscience with respect to the compensatory damages." ACPD Br. at 46. Indeed, the ACPD argues that this "award was so excessive as to give rise to a clear inference that the jury verdict was the result of mistake, passion, prejudice or partiality." *Id.* at 43. Therefore, according to the ACPD, we must set aside the jury's verdict and order a new trial. Once again, we disagree.

In *Dunn*, we observed that a defendant would be entitled to a new trial, rather than remittitur, upon showing that "the jury verdict resulted from passion or prejudice." *Dunn*, 1 F.3d at 1383; *see also* 11 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2815, at 165 (2d ed. 1995) (remittitur is "not proper if the verdict was the result of passion and prejudice, since prejudice may have infected the decision of the jury on liability, as well as on damages"). We further rejected the argument, however, that "the size of the award alone was enough to prove prejudice and passion." *Dunn*, 1 F.3d at 1383; *see also Mason v. Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991) (reducing a punitive damage award of $25 million by one-half because it shocked the court's conscience, but upholding the jury's liability determination because there was no evidence it was tainted). Here, as in *Dunn*, the defendant's only evidence of jury prejudice and passion is the amount of the punitive damage award itself. This is insufficient, and the ACPD's argument cannot prevail.

D. Jury Charge on Hostile Work Environment

The ACPD also argues that it is entitled to a new trial because the district court erred in its charge to the jury on hostile work environment by mixing different concepts from Title VII and the LAD. Specifically, defendant contends that the district court strayed from *Lehmann v. Toys 'R' Us, Inc.*, 626 A.2d 445 (N.J. 1993), in which the New Jersey Supreme Court formulated the basic standard for determining whether acts of harassment in the workplace constitute invidious discrimination in violation of the LAD. Under the *Lehmann* standard, a plaintiff must demonstrate that "the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive." *Id.* at 453.

The ACPD argues that the district court erred when it instructed the jury to consider ten factors, which the district court primarily derived from the ABA Model Charge[13] and Title VII caselaw, when determining

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[13] Section 104[2][b] of the ABA Model Charge provides the following list of factors that must be considered in hostile work environment claims:

> (1) the total physical environment of the plaintiff's work area;
>
> (2) the degree and type of obscenity that filled the environment of the workplace, both before and after the plaintiff arrived;

whether the ACPD was liable under the LAD. Finally, the ACPD argues that the district court failed to instruct the jury as to precisely how each of the factors bore on the issue of sexual harassment. "We generally review jury instructions for abuse of discretion to determine whether they are misleading or inadequate." *Woodson v. Scott Paper Co.*, 109 F.3d 913, 929 (3d Cir.), *cert. denied*, 118 S.Ct. 299 (1997). "However, when the question is whether the instructions misstate the law, our review is plenary." *Id.* (citing *Savarese v. Agriss*, 883 F.2d 1194, 1202 (3d Cir. 1989)). We review jury instructions to determine whether, "taken as a whole, they properly apprised the jury of the issues and the applicable law." *Dressler v. Busch Entertainment Corp.*, 143 F.3d 778, 780 (3d Cir. 1998) (quotation marks omitted).

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(3) the reasonable expectations of the plaintiff upon entering the environment;

(4) the nature of the unwelcome sexual acts or words;

(5) the frequency of the offensive encounters;

(6) the severity of the conduct;

(7) the context in which the sexual harassment occurred;

(8) whether the conduct was unwelcome;

(9) the effect on the plaintiff's psychological well-being;

(10) whether the conduct was physically threatening;

(11) whether it was merely an offensive utterance;

(12) whether it unreasonably interfered with the plaintiff's work performance.

ABA Model Charge § 104[2][b] (1994).

Under the first prong of the *Lehmann* test, a plaintiff must show "by a preponderance of the evidence that she suffered discrimination because of her sex." *Lehmann*, 626 A.2d at 454. Because the LAD is not a fault or intent-based statute, a plaintiff "need not show that the employer intentionally discriminated or harassed her, or intended to create a hostile work environment." *Id.* at 454.

The second prong requires that the objectionable *conduct* be sufficiently "severe or pervasive" to state an actionable claim. *See id.* at 455 ("We emphasize that it is the *harassing conduct* that must be severe or pervasive, not its effect on the plaintiff or on the work environment." (citing *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991))). In adopting this test, the court expressly rejected the "regular and pervasive" standard set forth by this court in *Andrews*, 895 F.2d at 1482. The New Jersey Supreme Court concluded that the *Andrews* test strayed from the United States Supreme Court's standard in *Meritor* and "would bar actions based on a single, extremely severe incident or, perhaps, even those based on multiple but randomly-occurring incidents of harassment." *Lehmann*, 626 A.2d at 455. Indeed, the New Jersey Supreme Court recently concluded that a plaintiff created a triable issue based on a single racial slur. *See Taylor v. Metzger*, 706 A.2d 685 (1998).[14]

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[14] In *Taylor*, the plaintiff presented evidence that her chief ranking supervisor called her a "jungle bunny" in the presence of another supervising officer. The court concluded that these circumstances "were sufficient to establish the severity of the harassment and alter the conditions of plaintiff's work environment." *Id.* at 693. Severity is measured by surrounding circumstances, *see id.* at 692, and " '[t]he required showing of

The third prong of the *Lehmann* test considers the harassment from the perspective of a reasonable woman (or man, as the case may be). Such an objective, gender-specific standard, according to the court, "provides flexibility" by "incorporating community standards" and focuses attention "on the nature and legality of the conduct, rather than on the reaction of the individual plaintiff," *Lehmann*, 626 A.2d at 458, and it also "recognize[s] and respect[s] the difference between male and female perspectives on sexual harassment." *Id.* at 459. "Only an idiosyncratic response of a hypersensitive plaintiff to conduct that a reasonable woman would not find harassing is excluded by the reasonable woman standard." *Id.* at 458-59.

Finally, under the fourth *Lehmann* prong, a plaintiff must show that "her working conditions were affected by the harassment to the point at which a reasonable woman would consider the working environment hostile." *Id.* at 457. A plaintiff need not demonstrate psychological harm or economic loss.

In this case, the district court's hostile work environment sexual harassment charge provided as follows:

> It is important to understand that, in determining whether a hostile work environment existed at the Atlantic City Police Department, you must consider the evidence from the perspective of a reasonable woman in the same

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severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.' " *Lehmann*, 626 A.2d at 455 (quoting *Ellison*, 924 F.2d at 878).

position. You must look at the evidence from the perspective of a reasonable woman's reaction to a similar environment under similar circumstances. That is, you must determine whether a reasonable woman would have been offended or harmed by the conduct in question. You must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would seriously affect the psychological or emotional well-being of a reasonable woman. The reasonable woman is simply an average woman of normal sensitivity and emotional make-up.

It is equally important to understand, however, that the reasonable woman standard applies only to the issue of liability for hostile work environment sexual harassment. It does not apply to liability for intentional sexual harassment, retaliation, or quid pro quo harassment, nor to the calculation of damages.

Plaintiff has alleged that she has been subjected to a hostile work environment because of harassment based on her sex. To prevail on this theory, she need not demonstrate any job benefits were conditioned on submitting to hostile sexual conduct or were denied because of refusing to give in to that conduct. Rather, to establish a claim of hostile work environment sexual harassment, plaintiff must prove by a preponderance of the evidence that the conduct about which she complains, one, would not have occurred but for the employee's gender, and it was, two, severe or pervasive enough to make a, three, reasonable woman believe that, four, the

conditions of employment are altered and the working environment is hostile or abusive.

The more severe the conduct, the less extensive it need be for you to find it is hostile.

Conversely, the less severe the conduct, the more persuasive [sic] or regular it should be in order for you to find that it is hostile.

Plaintiff's hostile work environment claim must be related to conditions which actually altered her own work environment. Statements, actions, or conditions which occurred at the Atlantic City Police Department outside the presence of plaintiff and plaintiff was unaware [sic] cannot be considered part of the hostile work environment, unless you find such statements, actions or conditions affected the plaintiff's own work environment.

In evaluating plaintiff's hostile work environment claims you should consider the following factors: one, plaintiff's reasonable expectation upon entering the workplace; two, the total physical environment of the area in which plaintiff worked; three, whether plaintiff was exposed to sexually explicit words or comments, drawings, graffiti, or obscenity in the workplace, and, if so, the degree, persistence, and type such [sic] obscenity to which exposed; four, whether the sexually explicit words or comments, drawings, graffiti or obscenity were directed at plaintiff, and, if so, the frequency of the offensive encounters; five[,] severity of the conduct and the context in which it occurred; six, whether the conduct was unwelcome, that is, conduct plaintiff regarded as unwanted or unpleasant; seven, the likely effect on a reasonable woman's psychological well-being; eight,

> whether the conduct reasonably [sic] interfered with plaintiff's work performance; nine, the extent to which supervisors upon learning of sexually harassing conduct, acted promptly and effectively to respond to such conduct; [ten], whether the complained of conduct was directed at men and woman [sic] alike.
>
> It is not enough that the work environment was generally harsh, friendly [sic], unple[a]sant, crude or vulgar to all employees of both sexes. In order to find a hostile work environment sexual harassment, you must find that plaintiff was harassed because she is a woman. The harassing conduct may, but need not be sexual in nature. Rather, its defining characteristic is that the harassment occurs because of the victim's sex.

App. at 5276-79.

We conclude that the district court's hostile work environment charge, taken as a whole, properly apprised the jury of the issues and law under the LAD. The charge clearly and accurately set forth the four-prong test set forth in *Lehmann*. Moreover, the court's list of factors provided additional guidance to the jury for its consideration of whether the requisite elements of liability had been established. Although this nonexhaustive list was largely derived from the ABA Model Charge and Title VII caselaw, we believe that the New Jersey Supreme Court would find many of these factors useful and relevant for deliberations in a hostile work environment sexual harassment claim under the LAD.[15] *See Lehmann*, 626

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[15] Because certain factors may or may not be relevant in any given case, our conclusion is necessarily limited to the facts of

A.2d at 452 ("In construing the terms of the LAD, this Court has frequently looked to federal precedent governing Title VII . . . as a key source of interpretive authority." (citation and quotation marks omitted)). As a result, we reject the ACPD's argument.[16]

We also find no merit in the ACPD's contention that one of the factors referenced in the charge, the plaintiff's reasonable expectation upon entering the workplace, is inconsistent with *Lehmann*'s requirement that the finder of fact consider workplace hostility "from the perspective of a reasonable woman." ACPD's Br. at 49 (quoting *Lehmann*, 626 A.2d at 457-58). In this case we do not see the harm from the shifting reference. Indeed, we fail to see how this distinction could aid the ACPD since, if anything, the "reasonable expectation upon entering the workplace" factor seems to give an employer extra leeway when a woman enters what she knows to be a traditionally male preserve, whereas the generalized reasonable woman standard is less concerned with what a workplace has traditionally been like and focuses on what a reasonable woman may rightfully expect from her employers. Finally, we reject the ACPD's contention that the district court erred in failing to instruct the jury as to precisely how each of the factors bore on the issue of sexual harassment.

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this case. Moreover, we do not suggest that the New Jersey Supreme Court would only look to the ABA Model Charge and Title VII caselaw when fashioning a set of factors to guide the jury in its deliberations.

[16] Because we conclude that the ACPD remains liable under the LAD, we need not consider whether the district court's charge misstated the law under Title VII.

E. Faragher v. City of Boca Raton *and* Burlington Industries v. Ellerth

After the initial oral argument on this appeal, the Supreme Court decided *Faragher v. City of Boca Raton and Burlington Industries v. Ellerth*. These decisions substantially changed the law of Title VII on employer liability. The ACPD contends that it is entitled to a new trial under the *Ellerth/Faragher* standards. For a variety of reasons, however, we conclude that the new structure and taxonomy of Title VII liability makes no difference to the outcome in this case. We first address the ACPD's claim that it was entitled to an affirmative defense, and then discuss the effects of *Ellerth* and *Faragher* on the "quid pro quo" claims in the case.

1. The Affirmative Defense

The ACPD claims that the trial court's jury instructions were defective because the jury was instructed that the existence of an effective sexual harassment policy was merely a factor to be considered in imposing liability and not an absolute defense. There are four problems with this claim.

First, *Ellerth* and *Faragher* do not, as the defendants seem to assume, focus mechanically on the formal existence of a sexual harassment policy, allowing an absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort. The necessary elements of a defense are "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,

and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 118 S. Ct. at 2270. A stated policy should be "suitable to the employment circumstances." *Id.*

The proof at trial focused extensively on what the ACPD did and failed to do about the harassment – issuing written policies but not enforcing them, painting over offensive graffiti every few months only to see it go up again in minutes, failing to investigate sexual harassment as it investigated and punished other forms of misconduct. Although it diligently attempted to convince the jury that its policies and procedures protected it, the ACPD failed to make a colorable case that its policies met the *Ellerth/Faragher* standards. *See Hurley*, 933 F. Supp. at 419; *cf. Payton v. New Jersey Turnpike Auth.*, 691 A.2d 321 (N.J. 1997) (holding that a slow remedial process or one that leaves an employee exposed to harassment cannot be effective). In *Faragher*, in fact, the Court found it unnecessary to remand for consideration of the newly codified defense, since the record established that Boca Raton failed to disseminate its policies or monitor the acts of its employees, so that as a matter of law it could not prevail on the defense. *See Faragher*, 118 S. Ct. at 2293; *see also Booker v. Budget Rent-A-Car Sys.*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998) (rejecting the affirmative defense on a summary judgment motion because the employer had notice of incidents of discrimination but failed to act on it).

A similar analysis applies here. The district court commented extensively on the ACPD's failure to implement anti-harassment policies or to inquire into the

harassing behavior of any of its employees. It was evident that Madamba, a supervisor with the duty to stop harassment, was aware of much of the harassment, even that which he did not himself inflict. The ACPD insists that there were *five* mechanisms that Hurley should have explored in full before suing: her direct supervisor, Internal Affairs, the Affirmative Action Officer, the Chief through his "open door policy," and the union grievance procedure. *See* ACPD Letter, July 16, 1998, at 5. However, there was extensive testimony at trial about the ineffectiveness of these mechanisms. Moreover, Hurley had no obligation to try all these mechanisms, because her immediate supervisor, who was responsible for preventing and redressing harassment pursuant to the ACPD's own policy, was on notice of the harassment. An employer cannot "use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law." *Williamson v. City of Houston*, 148 F.3d 462, 467 (5th Cir. 1998).[17]

Second, the ACPD apparently misreads the jury instructions. The liability instructions first stated that the ACPD would be liable for acts within the scope of a supervisor's employment, which was to be judged by the

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[17] *See also Distasio v. Perkin Elmer Corp.*, 157 F.3d 55 (2d Cir. 1998) (holding that, if a direct supervisor who had the responsibility to stop harassment knew of and failed to act against it, the plaintiff has no further obligation to bring it to the employer's attention); *Young v. Bayer Corp.*, 123 F.3d 672, 675 (7th Cir. 1997) (finding it sufficient for a plaintiff to give notice to someone who should reasonably be expected to stop the harassment or refer the complaint up the chain of command to someone who can stop it).

time, place, and foreseeability of the harassing acts. *See* XXII App. at A5281-82. The instructions continued that the existence of "a widely-disseminated anti-harassment policy or a well-publicized and an effective formal or informal complaint structure, training or monitoring mechanisms" would be evidence that sexual discrimination was not within the scope of employment. *Id.* at A5282.[18] Then, the instructions set forth the standard agency law on which *Faragher* and *Ellerth* relied – the employer is not liable for acts outside the scope of employment unless (1) the employer intended the conduct; (2) the employer was negligent or reckless in that it knew or

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[18] The *Ellerth/Faragher* defense applies only to harassment occurring outside the scope of employment. *See Ellerth*, 118 S. Ct. at 2267. For harassment to fall within the scope of employment, the harasser must be furthering the employer's purposes or acting in what he believes to be his employer's interests. *See id.* at 2266. The Court did not discuss how such motivations were to be determined, and we need not today address whether a patently ineffective harassment policy might communicate to male employees that harassment was an acceptable, expected means to interact with female officers. Rather, if the jury decided that the lack of an effective harassment policy justified holding the ACPD liable under a scope of employment theory, the same result would have been mandated under the *Ellerth/Faragher* standards for holding employers liable for negligence or for imposing vicarious liability when supervisory harassment creates a hostile work environment. The overlap between the standards was made clear by the instructions on negligence, which we describe *infra* in text. Thus, although this section of the instructions would no longer be appropriate to describe the scope of employment in a Title VII case, it did not mistakenly allow liability to be imposed in any circumstances in which an employer should properly be absolved.

should have known about the supervisor's actions and failed to take prompt and effective remedial measures; or (3) the supervisor was purporting to act as a supervisor, he had authority to control the employee's working environment, and his actions were aided and abetted by the authority delegated by the employer. *See* XXII App. at A5282-83 (tracking *Lehmann*, 626 A.2d at 461-62).

Next, the instructions listed factors to consider when determining whether the employer's negligence contributed to a supervisor's sexual discrimination: the existence of a formal anti-harassment policy; the presence of effective formal or informal complaint structures, training, and/or monitoring mechanisms; the extent to which the employee used the existing complaint procedures; and whether the employer took prompt and effective remedial action in response to complaints. According to the instructions, these factors should be evaluated together. *See id.* at A5283 (tracking *Lehmann*, 626 A.2d at 463). Finally, the instructions stated that the ACPD would be responsible for harassment by non-supervisory employees if it knew or should have known that such harassment was occurring and failed to take preventive or curative measures when it had reason to believe that harassment may have occurred; the jury was instructed to consider whether the ACPD took "all reasonable steps necessary to address sexual harassment." *Id.* at A5284.

The ACPD has failed to identify how these instructions conflict with *Faragher* and *Ellerth*, which relied on the same agency principles as *Lehmann*. Indeed the able trial judge quite presciently anticipated *Faragher* and *Ellerth*. The ACPD argues that the instructions allowed the jury to find it liable if the jury concluded that some

factors outweighed the existence of an effective sexual harassment policy. *See* ACPD Letter, July 16, 1998, at 8. The ACPD presumably means that the jury could have used the extent of the harassment to discount the ACPD's anti-harassment policy, although the ACPD is not clear on this issue. Of course, under *Faragher*, the extent of the harassment would be helpful evidence of the actual effectiveness of a formal policy, which is a necessary element of the *Faragher* defense. But that is beside the point, as the ACPD has confused the part of the instructions that sets forth a ten-factor test for determining whether a hostile environment existed, *see supra* Section II.A.4, with the part of the instructions that dealt with the ACPD's liability assuming that the jury found a hostile environment existed, *see* XXII App. at A5282-84. If anything, the ACPD got to double-dip on its harassment policy, because the jury was told to factor it into the initial hostile environment determination and then to use it again when considering liability. *See Payton*, 691 A.2d at 327 (approving this dual use).

A third reason to reject the ACPD's contention is that *Faragher* and *Ellerth* establish that the defense of employer due care is an affirmative one. *See Ellerth*, 118 S. Ct. at 2270. Thus, the employer bears the burden of proof. The instructions given at trial put the burden on Hurley to prove that the ACPD was liable for negligence despite its harassment policy and other remedial measures. Any error, therefore, worked in favor of the ACPD and could not justify a new trial.

Finally, *Faragher* and *Ellerth* do not necessarily control this case, which was also brought under the New Jersey LAD. Even if the jury instructions are not quite right with

respect to *Faragher*, there is no colorable argument that they misstated New Jersey law. For all these reasons, we conclude that these recent additions to Title VII jurisprudence do not require us to reverse the judgment of the district court.

2. The Quid Pro Quo Instruction

Hurley's quid pro quo claim was based on Madamba's alleged sexual invitations to her. She testified that when she complained about harassment to Madamba, he replied that women in the private sector avoided harassment because they "sleep with their bosses." When she attempted to change the subject and commented on Madamba's apparent weight loss, he stated that he lost weight by "having sex a few times a day," and that women came to him "when they're ready." Hurley interpreted this entire conversation as a solicitation for sex.

The dissent argues that *Ellerth* and *Faragher* require us to reverse because those cases held that there could be no quid pro quo claim as such if the plaintiff neither submitted to sexual demands nor suffered retaliatory action when she refused to submit. The jury instructions, however, required only that the jury find either that a supervisor conditioned tangible job benefits on submission to unwelcome sexual conduct, or that a supervisor penalized Hurley for refusing to participate in such conduct. It is possible, though not certain, that such instructions could be read to cover threats that were not acted upon. We agree with the dissent that *Ellerth* and *Faragher* largely eliminated the distinction between hostile work environment claims and quid pro quo claims, focusing

instead on the presence or absence of tangible adverse employment actions. *See Durham Life Ins. Co. v. Evans*, ___ F.3d ___, 1999 U.S. App. LEXIS 587 (3d Cir. Jan. 22, 1999). However, we conclude that the judgment should nonetheless be upheld.

The dissent persuasively identifies the reasons that the quid pro quo claim was the least tenable of Hurley's claims, at least under *Faragher* and *Ellerth*.[19] In fact, the conduct of which she complained was part of the hostile work environment she experienced, and this would necessarily have been apparent to the jury.[20] But in light of the total record here, we are satisfied that no jury would

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[19] We have no doubt that Madamba's suggestive remarks could be interpreted as a threat, and we do not mean to suggest that remarks of this sort cannot found a quid pro quo claim, though we agree with the dissent that the evidence of retaliation for refusal to accede is gossamer. Nor need we predict how New Jersey will react to *Faragher* and *Ellerth*. The LAD is a remedial statute, in some respects broader and more flexible than Title VII. *See Lehmann*, 626 A.2d at 452; *id.* at 460 (holding employers strictly liable for equitable damages and relief). This is so even though New Jersey often looks to the federal system for interpretive authority. *See id.* at 452. We thus believe it quite possible that New Jersey might retain a quid pro quo cause of action as such even after *Ellerth* and *Faragher*. The District Court's instructions, as the dissent notes, *see Dissent* at 66, are consistent with *Lehmann*. *See Lehmann*, 626 A.2d at 452; *see also Pukowsky v. Caruso*, 711 A.2d 398, 403 (N.J. Super. Ct. App. Div. 1998).

[20] Madamba's alleged conduct is the kind of conduct for which the ACPD could attempt to interpose its affirmative defense, but, as we have already held, that defense would fail because the ACPD's dereliction was even worse than that in *Faragher*, in which the Court declined to offer the defendants an opportunity to make out the defense on remand.

have found the defendants liable solely on the basis of the quid pro quo instruction. Multiple sources – including physical evidence – corroborated the most egregious examples of sexual harassment, including the tampon incident and the obscene graffiti, *see, e.g., infra* n. 5, while the only evidence of Madamba's suggestion came from Hurley's testimony. To us, it is inconceivable that a jury would have believed her testimony on this one issue, concluded that the ACPD was vicariously liable for one advance, and discounted the other incidents, which were sufficiently pervasive to constitute a hostile environment. Juries may be unpredictable, but we are not willing to posit total illogic, which would be contrary to our faith in the jury system as a whole. We are thus persuaded that any error was harmless.

We addressed a similar issue in *Murray v. United of Omaha Life Insurance Co.*, 145 F.3d 143 (3d Cir. 1998):

> We agree that the jury charge as given by the district court did not conform to New Jersey law as we predict it. Nonetheless, we will not reverse a judgment where "it is highly probable that the error did not contribute to the judgment," *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924 (3d Cir. 1985), *i.e.*, where the challenged error was harmless.

Id. at 156 (footnote omitted). An issue similar to that in this case arose in *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969), in which the District Court instructed the jury that it could return a verdict for the plaintiff if it found negligence in any one or more of thirty particulars. Each was supported by substantial evidence except one, and on that one count it was factually

impossible that liability could appropriately be found. The court found that "it is . . . inconceivable that in the mass of testimony so clearly establishing negligence in thirty other particulars this issue could have influenced the verdict against American." *Id.* at 195 (citing Fed.R.Civ.P. 61). Although there were fewer than thirty viable theories in this case, the weight of evidence and argument on the other theories of liability leads us to the same conclusion here.

We concede the general correctness of the dissent's proposition that faulty instructions on which a general verdict could have been based require reversal. The foundational case of *Maryland v. Baldwin*, 112 U.S. 490 (1884), addressed itself equally to faulty instructions and to erroneous admission of evidence, and announced that such errors require reversal. *See id.* at 493 ("If . . . upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld. . . . "). It has long been acknowledged, however, that *Baldwin* does not speak to the harmless error situation. *See Asbill v. Housing Auth. of the Choctaw Nation*, 726 F.2d 1499, 1504 (10th Cir. 1984) ("We note [*Baldwin*] does not paint with as broad a brush as appears from the language quoted. As with all errors committed at trial, a litmus test for reversal is whether the appellant was thereby unjustly prejudiced."). Evidentiary errors are subject to harmless error analysis, and the same is true for errors in instruction. *See id.*

Given Federal Rule of Civil Procedure 61's command to disregard "any error" that does not affect "the substantial rights of the parties," and the authorities set forth in

the margin,[21] we do not believe that we are creating a new rule. The cases cited by the dissent for the proposition that we must reverse are distinguishable because they deal with instances in which the record rendered it impossible to determine the basis for the jury's decision.

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[21] *See also Pressley v. Haeger*, 977 F.2d 295, 298 (7th Cir. 1992) (applying harmless error analysis to faulty instructions that, given the evidence, were unlikely to have influenced the jury); *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990) (where the relevant facts were the same for all theories, the evidence and argument focused on a legally correct theory, and it was unlikely that the incorrect theory influenced the jury, a verdict could be upheld despite one erroneous instruction); *Kassel v. Gannett Co.*, 875 F.2d 935, 950 (1st Cir. 1989) (invoking harmless error rule for faulty instructions but rejecting it on the merits because of the evidence and arguments at trial); *Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307, 1310 (10th Cir. 1986) (finding that an improper instruction, identical to one rejected by the Supreme Court because it did not contain all the necessary elements, did not mandate reversal because there was "substantial evidence" supporting the correct theory of liability, and holding harmless error analysis appropriate to jury instructions "when the erroneous instruction could not have changed the result of the case"); *Square Liner 360, Inc. v. Chisum*, 691 F.2d 362, 377 (8th Cir. 1982) (applying *Baldwin* with harmless error analysis); *Horne v. Georgia S. & Fla. Ry. Co.*, 421 F.2d 975, 980 (5th Cir. 1970) (finding a charge, if erroneous, harmless because the underlying facts so firmly supported the verdict on a proper charge); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 837-38 (2d Cir. 1967) (applying similar reasoning when one theory was improperly submitted to the jury); 11 *Wright et al., Federal Practice & Procedure* § 2886, at 467-70 ("Errors in instructions routinely are ignored if a motion for a directed verdict should have been granted, or if the erroneous instruction went to an issue that is immaterial in light of the jury's verdict, or if it is otherwise apparent that the error could not have changed the result." (footnotes omitted)).

We discuss them, too, in the margin.[22] To the extent that the dissent is concerned about broad application of the harmless error rule, we agree entirely, and emphasize that our decision is founded on the extreme facts of this case. Because any error in the quid pro quo instruction could not by any stretch of the imagination change the verdict, we need not reverse.

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[22] *See Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 534 (3d Cir. 1998) (portion of instructions invited the jury to use impermissible factors, and, given the focus of the trial evidence, "such infection almost certainly occurred"); *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 361 (3d Cir. 1998) (jury could have based liability on incidents of alleged negligence for which the standard of care was beyond common knowledge, and there was no expert testimony to guide them as to those incidents); *Avins v. White*, 627 F.2d 637, 646 (3d Cir. 1980) (reversing a judgment based on the "distinct possibility" that the jury imposed liability based on incidents of defamation that should not have been submitted to the jury); *cf. McKenna v. Pacific Rail Serv.*, 32 F.3d 820, 831-32 (3d Cir. 1994) (reversing judgment when an erroneous portion of the jury instructions "more than likely" guided the jury's deliberations). *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996 (3d Cir. 1988), on which the dissent relies, concerned a situation in which the verdict could have been based on erroneously admitted "direct" evidence of discrimination; here, the instructions did not require the jury to look at evidence it should not have considered. Indeed, even *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960 (3d Cir. 1979), while setting forth the general rule that errors in instruction require reversal, also cited with approval *Morrissey v. National Maritime Union*, 544 F.2d 19, 26-27 (2d Cir. 1976), describing its holding as follows: "[T]he general rule . . . must be followed unless it can be stated with confidence that the same verdict would have been returned even if the invalid claim had not been submitted to the jury." *Simko*, 594 F.2d at 967.

III. Punitive Damages

The ACPD argues that the district court erred by failing to instruct the jury that punitive damages could only be awarded against the ACPD "if there was 'actual participation by upper management or willful indifference.' " ACPD's Br. at 12 (quoting *Lehmann*, 626 A.2d at 464).[23] Because the ACPD did not object to the district court's charge on this ground, we will review this claim for plain error.

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[23] The ACPD raises two other arguments concerning the punitive damage award, but they need not detain us long. First, the ACPD argues that plaintiff's punitive damage award must be vacated as a matter of law because "both public policy and the most reasonable interpretation of the statutes [*i.e.*, the Tort Claims Act and the LAD] support the conclusion that punitive damages should not be available against a public entity under the [LAD]." ACPD's Br. at 20. However, we explicitly rejected this argument in *Gares v. Willingboro Township*, 90 F.3d 720 (3d Cir. 1996), and we are unaware of any developments that call this decision into question. Second, the ACPD contends that the punitive damage award must be vacated because the jury acted inconsistently when it imposed punitive damage liability on the ACPD but not on Madamba, the principal upper manager who was involved. This argument is also without merit. Punitive damages are awarded to deter and punish, and the jury could easily have concluded that the ACPD should pay punitive damages because both its potential for harm and its responsibility for the widespread harassment were far greater than Madamba's alone. Contrary to the ACPD's portrait of the facts, the testimony indicated that Madamba was far from a lone bad apple poisoning the ACPD. Moreover, the district court properly instructed the jury that an award of punitive damages was purely discretionary. We need not inquire further about why the jury chose to exercise its discretion in this manner.

The ACPD asserts that our plain error analysis should be guided by the New Jersey Appellate Division's decision in *Maiorino v. Schering-Plough Corp.*, 695 A.2d 353 (N.J. Super. Ct. App. Div.), *certif. denied*, 704 A.2d 19 (N.J. 1997). In *Maiorino*, the court observed that "a jury charge on punitive damages *must* include the instruction that *upper management* has to have . . . participated in or shown willful indifference to the situation." *Id.* at 368-69 (emphasis added) (citing *Rendine v. Pantzer*, 661 A.2d 1202 (N.J. 1995)). In fact, the court held that this concept is so essential to a fair trial that "the failure to charge the jury with the necessity of finding upper management's involvement to justify a punitive award is such a fundamental flaw that [an appellate court] must recognize it as a matter of plain error." *Id.* at 368 (citation omitted). While the *Maiorino* decision provides persuasive authority regarding the substantive correctness of a jury charge in a diversity case such as this, it is well established that the question of whether error is plain is one of federal law. *See Hinds v. General Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir. 1993) (discussing harmless error); *see also Beardshall v. Minuteman Press Int'l, Inc.*, 664 F.2d 23, 27 (3d Cir. 1981) ("[T]he failure to object to jury instructions and the consequences thereof are procedural and are to be governed by federal law."). Accordingly, we must look to this court's plain error jurisprudence when considering the ACPD's appeal with respect to the punitive damage award.

We have repeatedly stated that, "[i]n the absence of a party's preservation of an assigned error for appeal, we review only for plain error, and our power to reverse is discretionary." *Chemical Leaman Tank Lines, Inc. v. Aetna*

Cas. & Sur. Co., 89 F.3d 976, 993 (3d Cir.) (quoting *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1289 (3d Cir. 1995)), *cert. denied sub nom. Jackson v. Chemical Leaman Tank Lines, Inc.*, 117 S. Ct. 485 (1996). However, we should exercise our discretion sparingly so that Rule 51 and the beneficial policy goals it serves are not emasculated. *See Chemical Leaman*, 89 F.3d at 993-94; *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 770 n. 31 (3d Cir. 1990). "Thus, we should notice the error only if [it] is fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and our failure to consider the error would result in a miscarriage of justice." *Fashauer*, 57 F.3d at 1289 (quoting *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 53 (3d Cir. 1989)) (alteration in original) (internal quotation marks omitted).

In the present matter, there can be no doubt that the district court's charge was erroneous. The New Jersey Supreme Court has instructed that two distinct conditions must be satisfied before punitive damages may be awarded under the LAD. First, "punitive damages can only be assessed against an employer if there was 'actual participation by *upper management* or willful indifference.' " *Maiorino*, 695 A.2d at 368 (emphasis added) (quoting *Lehmann*, 626 A.2d at 464); *see also Maczik v. Gilford Park Yacht Club*, 638 A.2d 1322, 1326 (N.J. Super. Ct. App. Div. 1994). Second, a plaintiff must also set forth "proof that the offending conduct [is] 'especially egregious.' " *Rendine*, 661 A.2d at 1215 (quoting *Leimgruber v. Claridge Assocs., Ltd.*, 375 A.2d 652 (N.J. 1977)). Conduct may be sufficiently egregious if it is "intentional, malicious, and

'evil-minded.' " *Gares v. Willingboro Twp.*, 90 F.3d 720, 728 (3d Cir. 1996) (quoting Rendine, 661 A.2d at 1215); *see also Rendine*, 661 A.2d at 1215 ("Our cases indicate that the requirement [of willfulness or wantonness] may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." (citation and internal quotation marks omitted)).

By contrast, the district court's punitive damage charge clearly failed to instruct the jury on the upper management requirement:

> If you find that plaintiff has established that either the Atlantic City Police Department or Henry Madamba is responsible for having engaged in acts of sexual discrimination against the plaintiff, you must consider whether to award punitive damages. You are not to consider the issue of punitive damages against Nicholas Rifice.
>
> . . . .
>
> It is not sufficient to award punitive damages solely on the basis that a defendant has engaged in acts of sexual discrimination.
>
> *You may award plaintiff punitive damages solely on the basis that a particular defendant maliciously or wantonly violated plaintiff's rights*, and an act is done maliciously if it is prompted by ill will or spite toward the injured person, an evil-minded act. An act is done wantonly if it is done with a reckless, callous or deliberate disregard of the injured person's rights. The plaintiff must prove by a preponderance of the evidence that the defendant acted maliciously or wantonly.

. . . .

> In making your decision you should consider the purpose of punitive damages. You may consider whether the punitive damages are appropriate in order to punish the defendant adequately, whether punitive damages are necessary to prevent the defendant from committing these acts again, or whether punitive damages are likely to prevent others from committing similar acts.
>
> If you find the plaintiff is entitled to an award of punitive damages, the court will hold a further proceeding to determine the amount of that award.

App. at 5287-89 (emphasis added).

We conclude that the district court committed plain error when it failed to instruct the jury that punitive damages could only be assessed if there was "actual participation by upper management or willful indifference." The court's instructions failed to provide proper guidance for the jury on a fundamental question. Moreover, our failure to consider the error would result in a miscarriage of justice. There was also serious disagreement at oral argument and in the parties' briefs about whether Madamba was actually part of upper management during the relevant times.[24] Accordingly, we will vacate the punitive damage award against the ACPD.

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[24] On remand, the district court must determine whether Madamba was part of upper management. The ACPD claims that Madamba was a captain, along with numerous others with that rank. Although Madamba clearly was a supervisor of the personnel under his command, the ACPD contends that he did not establish policy and was not at the top tier of the department

IV. The Individual Defendants

A. Madamba

1. Assorted Challenges

Madamba raises a number of arguments on appeal. First, he contends that he was entitled to judgment as a matter of law because the jury's finding of individual liability under N.J.S.A. 10:5-12(a) was against the weight of the evidence. Implicit in this argument is Madamba's assumption that the jury returned a verdict of individual liability under N.J.S.A. 10:5-12(a). We do not agree with this assumption. The district court's charge in this case clearly stated that the individual defendants were liable, if at all, for aiding and abetting the employer's violation of the Act.

Hurley argues that supervisors may be individually liable as employers under the LAD. The New Jersey courts have not specifically addressed the issue. The dissent makes a cogent argument for individual liability, and it is clear that reasonable people can disagree on this point. But the New Jersey decisions cited by the dissent, *see* Dissent at 74-77, did *not* rule on individual supervisory liability, and hence we do not find them controlling. Nor do we think the statutory text offers guidance. While an "employer" may be "one or more individuals" under N.J.S.A. 10:5-5(a), that does not necessarily mean that supervisors, themselves employed by individuals or corporations, are "employers." Title VII defines "employer" to include "a person . . . who has fifteen or

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so as to be part of upper management. If a factual dispute should arise, however, the issue would be reserved for the jury.

more employees" or "any agent" of such a person, 42 U.S.C. § 2000e(b), and it could be subjected to the same analysis the dissent uses to find individual liability possible under LAD.

We also note that imposing direct liability on supervisors, who are likely to be substantially judgment-proof, will not significantly add to the force of anti-discrimination law, which already gives employers incentives to ban discrimination and monitor supervisors' activities. We think that there is insufficient reason to predict that New Jersey would diverge from the federal scheme on this point. *See, e.g., Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077-78 (3d Cir. 1996). In sum, while the point is close, as well as unclear, we are simply not willing to predict that New Jersey would include supervisors in the statutory definition of "employer."[25]

Second, Madamba joins the ACPD's evidentiary challenges and its attack on the hostile work environment charge, which we have already rejected. Third, he objects that the court permitted the jury to find liability against Madamba on four separate theories of liability when they should have only considered liability for hostile work environment sexual harassment. We do not agree, because the various theories of liability were properly submitted to the jury. There was sufficient evidence on all theories to go to the jury, and the instructions clearly indicated that the mere presentation of a possible theory

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[25] Trends may change, however, and a panel looking at this issue a year from now might see New Jersey pursuing a different course on supervisory liability through section 10:5-5(a).

to the jury did not mean that any defendant was liable on that theory, or on any theory. We reiterate that the instructions indicated that the individual defendants were liable, if at all, for aiding and abetting the employer's violation of the Act.[26]

Fourth, Madamba argues that the court's compensatory damages charge failed to instruct the jury "that it cannot award damages for any conduct that plaintiff was not subjected to, aware of, or with respect to Madamba, which occurred prior to 1990." Madamba Br. at 49-50. But the relevant section of the instructions adequately limited Madamba's exposure by setting forth the time limits on recovery and the purposes for which the jury could use evidence of acts not directed at Hurley, even though it

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[26] Madamba particularly assails the availability of a quid pro quo instruction, which we discuss in greater detail *supra* Section II.E.2. The evidence to support Hurley's quid pro quo theory was a conversation she had with Madamba in which she complained about harassment and he responded that women in the private sector protect themselves from harassment by "sleeping with" their bosses and that women approached Madamba for sex "when they're ready." After she made no response to these suggestive comments, he allegedly took further discriminatory action against her by transferring her to a less desirable position. However, as we suggested above, this is less a quid pro quo case than a hostile environment case, inter alia because it seems more plausible that the transfer, if retaliatory, was based on Hurley's memo alleging harassment and not on her rejection of Madamba's putative advances. At all events, as discussed below in Section IV.A.2, we conclude that a reasonable jury could impose aiding and abetting liability on Madamba for his substantial contribution to the hostile work environment; his putative advances could be evidence of aiding and abetting.

did not specifically mention Madamba at that point. *See supra* Section II.B.

2. *Aiding and Abetting*

Finally, Madamba contends that the court's aiding and abetting instruction permitted the jury to impose individual liability under an erroneous standard. The LAD provides that it is unlawful for "any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." N.J.S.A. 10:5-12(e). In our decision in *Failla v. City of Passaic*, issued after the verdict in this case, we held that individual supervisors may be liable for aiding and abetting under the LAD. In reaching this conclusion, we predicted that the New Jersey Supreme Court would follow the Restatement (Second) of Torts § 876(b) to define aiding and abetting liability under the LAD. *See Failla*, 146 F.3d at 158. That section provides "that a person is liable for harm resulting to a third person from the conduct of another when he 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. . . .' " *Id.* (quoting Restatement (Second) of Torts § 876(b)). We also predicted that, under New Jersey law, "inaction can form the basis of aiding and abetting liability if it rises to the level of providing substantial assistance or encouragement." *Id.* at 158 n. 11 (citing *Dici v. Pennsylvania*, 91 F.3d 542, 553 (3d Cir. 1996)).

While we have rejected a requirement that an individual and an employer share the same discriminatory

intent in order to find aiding and abetting liability, *see Failla*, 146 F.3d at 157, we have not fully elucidated the principles that might allow a harassing supervisor to be individually liable for aiding and abetting the actionable conduct of his employer, when the challenged conduct is failing to stop the supervisor's own harassment. *Cf. United States v. Sain*, 141 F.3d 463, 474 (3d Cir. 1998) (finding that a person can aid and abet a corporation that he or she fully owns and controls). This is a somewhat awkward theory of liability. We believe, however, that it can be explained in this manner: A supervisor, under New Jersey law, has a duty to act against harassment. *See Taylor*, 706 A.2d at 691. This duty can be violated by deliberate indifference or affirmatively harassing acts. When a supervisor flouts this duty, he subjects himself and his employer to liability. *Cf. Judson v. Peoples Bank & Trust Co.*, 134 A.2d 761 (N.J. 1957) (holding that both agent and principal will be liable when the agent acts within the scope of his employment but for his own purposes).

The ACPD's wrongful conduct in this case was inaction – its tolerance of sexual harassment. The jury had evidence before it that Madamba assisted this tolerance by tolerating and even encouraging the harassment. As part of the chain of command that Hurley was expected to follow, he controlled her access to the most effective potential solutions to the harassment. Instead of taking steps to assist her, he told her that she should stop complaining or it would only get worse; he suggested that sleeping with him might protect her; he laughed at the drawings and graffiti about her; and he demeaned her as an officer on a daily basis. When she finally went over

his head and requested a transfer because of the harassment, he gave his superior a memo accusing her of lying. We are also mindful of the moral authority of a police captain over his officers. When Madamba laughed at Hurley's discomfort and denigrated her, his officers could easily learn the lesson that harassing women was part of being an ACPD officer.

Madamba arguably failed to stop the harassment because he wanted it to continue. But, as *Failla* held, there is no requirement of "shared intent" between the primary wrongdoer and the aider and abettor. If Madamba's malice substantially assisted the ACPD's inaction, then he is an aider and abettor despite any difference in state of mind, assuming that the ACPD can be said to have a mental state. His liability can be grounded in his failure to stop the harassment, which included both active and passive components.

Because we conclude that Madamba could be liable for aiding and abetting, we must decide whether the jury instructions adequately set forth the applicable law. Based on Restatement § 876(b), courts have determined that the tort of aiding and abetting involves three elements: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *see also In re Temporomandibular Joint (TMJ) Implants Prods.*

Liab. Litig., 113 F.3d 1484, 1495 (8th Cir. 1997); *Metge v. Baehler*, 762 F.2d 621, 624 (8th Cir. 1985).[27]

The district court provided the following charge for aiding and abetting:

> [I]ndividual defendants . . . may be held liable only for their individual, affirmative wrongful acts. They may not be held liable for the conduct of others, nor for their inaction or delay in responding to such conduct. An individual defendant may be held liable, however, if he aids, abets, incites, compels or coerces another person's unlawful acts of discrimination.
>
> . . . .
>
> Aid is defined as meaning to assist, support or supplement the efforts of another. Abet is defined as meaning to encourage, counsel, incite or instigate the commission of unlawful conduct.
>
> In order the [sic] aid or abet another to commit an unlawful act, it is necessary that the defendant willfully and knowingly associate himself in some way with the unlawful act, and that he willfully and knowingly seek by some act to make the unlawful act succeed.

App. at 5284, 5314.

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[27] To determine whether a defendant provided "substantial assistance," the comments to section 876 of the Restatement provide a list of five factors: "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind." Restatement (Second) of Torts § 876(b) cmt. d. (1979). Additionally, the court in *Halberstam* provided a sixth factor, the duration of the assistance provided. *See Halberstam*, 705 F.2d at 484.

Although the district court's charge is compatible in some respects with the substance of section 876(b), the court misstates the law in two crucial respects: First, the charge does not allow for liability based on inaction. To be sure, Madamba can hardly claim he was prejudiced by this particular omission, because the jury concluded that he committed affirmative, harassing conduct. But the instructions also allowed the jury to impose liability for mere assistance, rather than substantial assistance. This was incorrect. Moreover, we cannot conclude that it is highly probable that the absence of a substantial assistance requirement did not affect the jury's verdict. *See McQueeney*, 779 F.2d at 924. Accordingly, we must vacate the judgment against Madamba and order a new trial.[28]

B. Rifice

Hurley argues in her cross-appeal that the district court's aiding and abetting charge misstated the law

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[28] Madamba additionally argues that the jury instructions were flawed because they covered aiding and abetting "another person's unlawful acts" and then, when the jury inquired further, the court stated that the defendant had to "willfully and knowingly associate himself with the unlawful act." Madamba Letter at 8. He argues that this is erroneous because the instruction should have required association with the employer and not the act. This is a misreading of *Failla*, which rejected a shared intent requirement. Moreover, Madamba was associated with his employer as a matter of course. Finally, the New Jersey Appellate Division case of *Baliko v. Stecker*, 645 A.2d 1218 (N.J. Super. Ct. App. Div. 1994), undermines Madamba's position. *Baliko* held that aiding and abetting liability could exist when one union member aided other union members and the sum total of acts was sufficient to cause the union to be liable.

under the LAD by requiring a finding of affirmative sexual harassment before Rifice could be found individually liable. She also argues that the district court erred by striking her punitive damage claim against Rifice. We agree.

As noted above, the district court's aiding and abetting charge provided that the "individual defendants such as Nicholas Rifice and Henry Madamba . . . may only be held liable for their individual, affirmative wrongful acts." XXII App. at 5284. However, in *Failla*, we expressly rejected this view and concluded that "inaction can form the basis of aiding and abetting liability if it rises to the level of providing substantial assistance or encouragement." *Failla*, 146 F.3d at 158 n. 11. Accordingly, the district court's charge misstated the law under the LAD. The district court noted that the charge might well have determined the jury's verdict. *See Hurley*, 933 F. Supp. at 417-18.

The evidence against Rifice mainly concerned his awareness of and apparent indifference to the harassment. Rifice testified that he did nothing to stop the harassment because the harassers should already have known better and he did not believe that he could do anything about it. This kind of knowing inaction by a high-level employee with responsibility over Hurley and her harassers could, we think, rise to the level of substantial assistance. We will therefore vacate the judgment in favor of Rifice and the district court's order striking plaintiff's punitive damage claim against Rifice.

C. Mooney

Hurley next argues that the district court erred by granting summary judgment in favor of defendant Mooney.[29] Mooney argued, and the district court agreed, that he was entitled to summary judgment on Hurley's LAD claim because, as a non-supervisory co-employee, he was not an "employer" for purposes of N.J. Stat. Ann. § 10:5-5(e).[30] *See Hurley v. Atlantic City Police Dept.*, 1995 WL 854478, at *10 (D.N.J. Aug. 4, 1995). The court reached this conclusion, in part, because "non-supervisory co-employees cannot be held liable under Title VII, and New Jersey courts have often looked to that statute to resolve questions under the NJLAD." *Id.* (citing *Lehmann*, 626

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[29] We review the district court's decision granting summary judgment *de novo*, and we apply the same test the district court should have applied in the first instance. *See Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996); *Helen L. v. DiDario*, 46 F.3d 325, 329 (3d Cir. 1995). We must determine, therefore, whether the record, when viewed in the light most favorable to Hurley, shows that there is no genuine issue of material fact and that Mooney was entitled to summary judgment as a matter of law. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

[30] The Act provides that an employer "includes all persons as defined in subsection a. of this section unless otherwise specifically exempt under another section of this act, and includes the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies." N.J. Stat. Ann. § 10:5-5(e). Subsection (a) provides that the term "[p]erson includes one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries." N.J. Stat. Ann. § 10:5-5(a).

A.2d at 452). Although Mooney may have had considerable unofficial power because of his well-known promotion prospects and highranking relatives, he was not an "employer."

Hurley argues that § 10:5-5(e) is not relevant because Mooney was individually liable under the LAD as an aider and abettor. We predict that, under New Jersey law, a nonsupervisory employee cannot be held liable as an aider and abettor for his own affirmative acts of harassment, because such affirmative acts do not substantially assist the employer in *its* wrong, which is its failure to prevent and redress harassment by individual employees.[31] Rather, a nonsupervisory employee's harassment takes advantage of the employer's wrongful conduct; it is the employee who seems to be "aided and abetted" by the employer.[32] A supervisor, by contrast,

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[31] The dissent argues that the employer's wrong can also consist of the wrongs of its supervisors who commit willful harassment. This is a thorny question of agency law; usually, the employer is said to be vicariously liable for certain acts of its agents, as in *Ellerth* and *Faragher*, and directly liable for its own negligence, if any, in allowing its agents to behave badly. Query whether vicarious liability means that a person who aids and abets an agent also aids and abets the principal? We need not resolve this nice question, however, because the dissent's argument presupposes that Madamba can be held individually liable as a harasser under N.J.S.A. § 10:5-5(a), a proposition we have already predicted that New Jersey courts would reject. Moreover, if the claim were that Mooney substantially assisted Madamba's harassment, no reasonable jury could find that Mooney's conduct rose to the level of substantial assistance based only on the two incidents recited by the dissent.

[32] Mooney claims that a nonsupervisor cannot aid and abet because only supervisors can create liability for an employer. As

may be liable as an aider and abettor for active harassment or knowing and willful inaction, because in either case the supervisor violates his or her duty as a supervisor to prevent and halt harassment.[33]

Volume 2 of 2

Filed March 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-5633, 96-5634, 96-5661, 96-5738

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY, husband and wife,

v.

THE ATLANTIC CITY POLICE DEPARTMENT, a subdivision of the City of Atlantic City; HENRY MADAMBA; NICHOLAS V. RIFICE; JOHN MOONEY;

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cases imposing liability for coworker harassment demonstrate, that statement of the law is erroneous. We also note that, under the LAD, "any person" may aid and abet; no ability to bind the employer is necessary. New Jersey may ultimately decide, contrary to our prediction, that harassment by a nonsupervisory employee can constitute aiding and abetting, in which case we would of course follow its interpretation of state law.

[33] We note that the claims against the individual defendants are largely symbolic. Hurley's monetary recovery will come from the ACPD, and in practical terms the liability of the individual defendants is not that significant.

JOHN DOES 1 THROUGH 50 inclusive, fictitious name defendants, jointly, severally, and in the alternative

(Camden New Jersey District Civil No. 93-260).
SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY, wife and husband,

v.

THE ATLANTIC CITY POLICE DEPARTMENT, a subdivision of the City of Atlantic City; HENRY MADAMBA; NICHOLAS V. RIFICE; JOHN MOONEY; JOHN DOES 1 THROUGH 50, inclusive, jointly, severally, and in the alternative

(Camden, New Jersey District Civil No. 94-1122),

Atlantic City Police Department,
Appellant No. 96-5633.

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY, husband and wife,

v.

THE ATLANTIC CITY POLICE DEPARTMENT, a subdivision of the City of Atlantic City; HENRY MADAMBA; NICHOLAS V. RIFICE; JOHN MOONEY; JOHN DOES 1 THOUGH 50, inclusive, fictitious name defendants, jointly, severally, and in the alternative

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(Camden, New Jersey District Civil No. 94-1122),

Henry Madamba,
Appellant No. 96-5634.

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY, husband and wife,

v.

THE ATLANTIC CITY POLICE DEPARTMENT, a subdivision of the City of Atlantic City; HENRY MADAMBA; NICHOLAS V. RIFICE; JOHN MOONEY; JOHN DOES 1 THOUGH 50, inclusive, fictitious name defendants, jointly, severally, and in the alternative

(Camden New Jersey District Civil No. 93-260).

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY, wife and husband

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THE ATLANTIC CITY POLICE DEPARTMENT, a subdivision of the City of Atlantic City; HENRY MADAMBA; NICHOLAS V. RIFICE; JOHN MOONEY; JOHN DOES 1 THROUGH 50, inclusive, jointly, severally, and in the alternative

(Camden New Jersey District Civil No. 94-1122),

Donna M. Hurley, and Patrick K. Hurley,
Appellants No. 96-5661.

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY, husband and wife,

v.

THE ATLANTIC CITY POLICE DEPARTMENT, a subdivision of the City of Atlantic City; HENRY MADAMBA; NICHOLAS V. RIFICE; JOHN MOONEY;

JOHN DOES 1 THROUGH 50, inclusive, fictitious name defendants, jointly, severally, and in the alternative

(Camden New Jersey District Civil No. 93-260).

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY, wife and husband

v.

THE ATLANTIC CITY POLICE DEPARTMENT, a subdivision of the City of Atlantic City; HENRY MADAMBA; NICHOLAS V. RIFICE; JOHN MOONEY; JOHN DOES 1 THROUGH 50, inclusive, jointly, severally, and in the alternative

(Camden, New Jersey District Civil No. 94-1122),

Donna M. Hurley, and Patrick K. Hurley,
Appellants No. 96-5738.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Nos. 93-cv-00260, 94-cv-01122)

Argued May 4, 1998.
Reargued October 5, 1998.

BEFORE: BECKER, Chief Judge, SCIRICA and COWEN, Circuit Judges

(Filed March 18, 1999)

V. The Hurleys' Remaining Claims

Hurley argues that the district court abused its discretion by denying her motion for an additur. While the basis for her claim is not entirely clear, she appears to suggest that she is entitled to an additur because the

district court's jury charge erroneously limited liability to the accrual period (January 20, 1987 through January 20, 1993), even though there was ample evidence in the record that defendants continued to harass her through the end of trial. Although she has filed a related action to include these later claims, she has advised the court "that she would be willing to forego her compensatory claims in that other action were this Court to exercise its appellate jurisdiction in the form of an additur." Appellee's Br. at 38-39. Yet the Hurleys filed their original complaint in this action on January 20, 1993. Since that date, they have not amended their complaint to include any claims for conduct that occurred after that time; those claims remain in their related action. Clearly, the district court did not abuse its discretion by denying an additur based on claims that were never before the court.

Hurley next claims that the district court erred by denying her prejudgment interest on the remitted compensatory award. In *Coleman v. Kaye*, 87 F.3d 1491 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 754 (1997), we considered whether a plaintiff could recover prejudgment interest against the County of Monmouth after a jury found the County liable under the LAD for intentional sexual discrimination. In rejecting such an award, we observed:

> Nor can prejudgment interest be assessed against the County of Monmouth. The court rule that Coleman invokes expressly provides that prejudgment interest will not be awarded against a public entity "[e]xcept where provided by statute. . . . " N.J. Ct. R. 4:42-11(b). There is no statutory authorization in New Jersey for such an award. To the contrary, as the New Jersey Appellate Division stated in *Maynard v.*

> *Mine Hill Township*, 244 N.J. Super. 298, 582 A.2d 315, 318 (App. Div. 1990), the New Jersey Tort Claims Act "specifically prohibits prejudgment interest against government tortfeasors."

Id. at 1511-12 (citation omitted). Accordingly, we will affirm the district court's denial of plaintiff's motion for prejudgment interest.

Mr. Hurley argues that the district court erred by granting summary judgment on his loss of consortium claim under the LAD. Specifically, he asserts that the LAD permits recovery of all damages available under the common law, and a claim for loss of consortium is "more accurately described as an element of damage rather than a separate cause of action. . . . " Appellee's Br. at 42. He further asserts that a claim for loss of consortium under the LAD effectuates the remedial purposes of the statute by providing compensation for the damage done to his marital relationship.

Although the New Jersey Supreme Court has not answered the question of whether *per quod* damages for loss of consortium are recoverable under the LAD, the Superior Court of New Jersey, Appellate Division, firmly rejected such a claim in *Catalane v. Gilian Instrument Corp.*, 638 A.2d 1341 (N.J. Super. Ct. App. Div. 1994). Specifically, the court held that "the Legislature did not intend to establish a cause of action for any person other than the individual against whom the discrimination was directed." *Id.* at 1353 (citing N.J. Stat. Ann. § 10:5-3); *cf. Flaherty v. Enclave*, 605 A.2d 301, 305 (N.J. Super. Ct. Law Div. 1992) (*per quod* damages are not recoverable under

the Conscientious Employee Protection Act, or "whistleblower" statute). In reaching this conclusion, the *Catalane* court reasoned that "[i]f *per quod* claims were to be allowed under the Act, the Legislature would have so noted in light of its careful recitation of the damages it intended to allow." *Catalane*, 638 A.2d at 1353. Because the court's holding rests on a sensible reading of the LAD, we predict that the New Jersey Supreme Court would follow *Catalane* and conclude that the LAD makes no provision for such an ancillary claim. Accordingly, the district court properly granted summary judgment as to Mr. Hurley's loss of consortium claim.

Finally, plaintiff's counsel argues that the district court erred by setting his hourly rate at $200, rather than his requested hourly rate of $300. Counsel contends that, although his requested rate was supported by an independent affidavit, the court instead relied on "an unsworn hearsay letter from a senior partner in a law firm that routinely defends Atlantic City Police Department representatives." Appellee's Br. at 40. Counsel further contends that the court based the $200 rate on a generalized sense of what is customary and proper, rather than on appropriate record evidence.

We review the reasonableness of an award of attorney's fees for an abuse of discretion.[34] *See Smith v. Philadelphia Housing Auth.*, 107 F.3d 223, 225 (3d Cir. 1997);

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[34] Although "[t]he New Jersey approach to the issue of contingency enhancement under the LAD is a marked departure from the Supreme Court's interpretation and application of federal fee-shifting statutes," *Coleman*, 87 F.3d at 1511 (citing *Rendine v. Pantzer*, 661 A.2d 1202 (N.J. 1995)), the New Jersey Supreme Court's approach to reviewing the calculation of

Washington v. Philadelphia County Ct. of Common Pleas, 89 F.3d 1031, 1034 (3d Cir. 1996). As we observed in *Smith*:

> [A] district court may not set attorneys' fees based upon a generalized sense of what is customary or proper, but rather *must* rely upon the record. The plaintiff bears the burden of producing sufficient evidence of what constitutes a reasonable market rate for the essential character and complexity of the legal services rendered in order to make out a prima facie case. Once the plaintiff has carried this burden, defendant may contest that prima facie case only with appropriate record evidence. In the absence of such evidence, the plaintiff must be awarded attorney's fees at her requested rate. If the hourly rates are disputed, the district court must conduct a hearing to determine the reasonable market rates.

107 F.3d at 225 (quotation marks and citations omitted).

In the present matter, the district court found that the proposed fees of plaintiff's counsel were excessive for the following reasons:

> The defendants have submitted an affidavit accompanied by a letter from Jack Plackter, Esq., of the law firm of Horn, Goldberg, Gorny, Daniels, Plackter & Weiss. Mr. Plackter writes that his firm charges the following rates: partners, $95-$225; associates, $85-$150; paralegals, law

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hourly rates under the LAD is generally similar to the approach taken by this court when reviewing the calculation of hourly rates under federal fee-shifting statutes. *See Rendine*, 661 A.2d at 1227 (citing *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990)). Accordingly, we will review the district court's hourly-rate calculation in light of federal precedent.

> clerks, and other unlicensed legal assistants, $50-$70.
>
> We believe that Mr. Plackter's submitted rates provide a more suitable framework in which to set fees. Based on Mr. Plackter's letter, the other evidence in the record, the Court's close familiarity with the New Jersey legal market, our direct experience with Mr. Van Syoc and his employees, and applicable case law, we will apply the following hourly rates: Mr. Van Syoc: $200.00; Mr. Folkman: $150.00; Mr. Blaker: $115.00; Junior Associates (Allen, Kopelson, Erdek, Byler): $85.00; Law Clerks and Paralegals: $50.00.

933 F. Supp. at 428.

To the extent that the district court's calculation of hourly rates was based on a "generalized sense of what is customary and proper," rather than on evidence in the record, it was error. *Smith*, 107 F.3d at 225. However, because defendants submitted an affidavit to contest the hourly rates, and because plaintiff's counsel waived any right to a hearing on this issue,[35] we cannot conclude that the district court abused its discretion in concluding that

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[35] The district court explicitly provided that the parties could have a hearing on the attorney's fee issue if they requested one, *see Hurley*, 933 F. Supp. at 429 n. 31, but the record does not reveal that any such hearing ever occurred. Moreover, plaintiff's counsel has not argued for a hearing on appeal. Instead, he continues to argue that he is entitled to his proposed hourly rate of $300 because defendants have not submitted appropriate record evidence to challenge this rate. This amounts to a waiver. *See Williams v. Butler*, 802 F.2d 296, 301 (8th Cir. 1986) (en banc), *vacated on other grounds sub nom. City of Little Rock v. Williams*, 485 U.S. 931 (1988).

the $200 hourly rate is proper under the circumstances. Accordingly, we will affirm the district court's order granting plaintiff attorney's fees subject to a reduced rate. However, in light of our decisions with respect to the individual defendants in this case, we will vacate the fee award order insofar as it established the total hours worked on successful claims and the total fee award and remand for reconsideration.

VI.

For the foregoing reasons, we will affirm the amended judgment insofar as it imposes liability on the ACPD. However, we will vacate the amended judgment to the extent it awards punitive damages against the ACPD and order a new trial on this issue. Moreover, we will vacate the amended judgments entered against defendant Madamba and in favor of defendant Rifice, but affirm the district court's order granting Mooney's motion for summary judgment. Finally, we will affirm the district court's orders dismissing Mr. Hurley's loss of consortium claim, denying plaintiff's motions for pre-judgment interest and an additur, and granting plaintiff's motion for attorney's fees subject to a reduced hourly rate.

COWEN, *Circuit Judge, concurring in part, and dissenting in part.*

I agree with the majority that a new trial is necessary with respect to defendants Madamba and Rifice. I also agree that the District Court's instruction to the jury regarding liability for punitive damages under the New Jersey Law Against Discrimination ("LAD") constituted

plain error, and that the District Court properly dismissed Mr. Hurley's loss of consortium claim, denied plaintiff's motion for prejudgment interest and an additur, and granted plaintiff's motion for attorneys' fees subject to a reduced hourly rate.

I must respectfully part company with the majority, however, insofar as they affirm the judgment of liability against the ACPD. The District Court instructed the jury that it could find Madamba and the ACPD liable based on, among other theories, *quid pro quo* sexual harassment. But the District Court's instruction on this subject was erroneous because it did not require that the jury find that plaintiff suffered a tangible employment action as a result of her refusal to submit to her supervisor's sexual demands. Moreover, even if the jury instruction was correct, there is simply no evidence to support plaintiff's *quid pro quo* claim. Because the jury was asked only to return a general verdict as to the defendants' liability without specifying which theory of liability it credited, it is possible that the jury assessed liability against the ACPD based on a legally and factually flawed theory. Under these circumstances, both Supreme Court and Third Circuit authority require that we vacate the judgment against the ACPD. The majority's adoption of a harmless error doctrine to salvage the tainted general verdict in this case is both contrary to precedent and exceedingly unwise.

I also dissent from the majority's prediction of New Jersey law that there is no cause of action against individual supervisors for their own acts of sexual harassment under LAD § 10:5-12(a). Numerous decisions of the New Jersey courts, including the New Jersey Supreme Court

itself, support Hurley's contention that supervisors such as Rifice and Madamba are "employer[s]" within the meaning of § 10:5-12(a). The majority's holding to the contrary erroneously substitutes our assessment of the LAD in place of the New Jersey courts' interpretation of their own statute. Finally, because there is sufficient evidence from which a jury could conclude that defendant Mooney aided and abetted Madamba and the ACPD in creating a hostile work environment, I would reverse the District Court's grant of summary judgment in his favor.

I. *Quid Pro Quo Liability*

The District Court charged the jury that the ACPD and Madamba could be liable based on four separate and distinct theories of sex discrimination: (i) intentional discrimination; (ii) hostile work environment; (iii) retaliation; and (iv) *quid pro quo*. With respect to *quid pro quo* sexual harassment, this court has held:

> [U]nwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature constitute [*quid pro quo*] sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

Bonenberger v. Plymouth Township, 132 F.3d 20, 27 (3d Cir. 1997) (internal quotation omitted). Similarly, the New Jersey Supreme Court, interpreting the LAD in *Lehmann v. Toys 'R Us*, 626 A.2d 445 (1993), stated that "*quid pro quo* sexual harassment occurs when an employer attempts to

make an employee's submission to sexual demands a condition of his or her employment. It involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences." *Id.* at 452.

Our understanding of *quid pro quo* sexual harassment has been altered by the Supreme Court's decision in *Burlington Indus., Inc. v. Ellerth,* 118 S. Ct. 2257 (1998). In *Ellerth,* the Court granted certiorari to decide whether a plaintiff may state a claim for *quid pro quo* sexual harassment "where the plaintiff employee has neither submitted to the sexual advances of the alleged harasser nor suffered any tangible effects on the compensation, terms, conditions, or privileges of employment as a consequence of a refusal to submit to those advances?" 118 S. Ct. at 2265. Notwithstanding this question, the Court determined that the critical issue in the case was the scope of employer liability, not the contours of *quid pro quo* sexual harassment. As the Court made clear, for the purposes of determining employer liability, the categories of *quid pro quo* and hostile work environment are not controlling. *Id.* Still, the Court acknowledged that the categories "are relevant when there is a threshold question whether a plaintiff can prove discrimination" to the extent that "they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general." *Id.* According to the Supreme Court, cases such as *Ellerth,* which involve only unfilled threats and no tangible employment action, are properly categorized as hostile work environment claims, not *quid pro quo* claims. *Id.*

Accordingly, to prove a claim of *quid pro quo* sexual harassment, a plaintiff must demonstrate either that she submitted to the sexual advances of her alleged harasser or suffered a tangible employment action as a result of her refusal to submit to those sexual advances. *See Newton v. Cadwell Labs.*, 156 F.3d 880, 883 (8th Cir. 1998) (discussing *quid pro quo* claims after *Ellerth*); *Ponticelli v. Zurich American Ins. Group*, 16 F. Supp. 2d 414, 428 (S.D.N.Y. 1998) (same).

In this case, the District Court instructed the jury regarding *quid pro quo* sexual harassment as follows:

> Finally, *quid pro quo* sexual harassment. Loosely translated, *quid pro quo* means, this for that. To prove *quid pro quo* sexual harassment, plaintiff must prove by a preponderance of the evidence that someone with supervisory authority over her engaged in conduct that conditioned tangible job benefits including compensation, promotion, and other terms, conditions or privileges of employment on submission to unwelcome sexual conduct or penalized her for refusing to participate in such conduct.

App. at A5280. Although the District Court's instruction would have been acceptable under *Bonenberger* and *Lehmann*, it fails under *Ellerth*. Most problematically, the instruction did not require that plaintiff prove that she actually suffered a tangible employment action as a result of her refusal to submit to her supervisor's sexual advances. As the majority acknowledges, Maj. Op. at 37, the instruction permitted the jury to find liability for *quid pro quo* sexual harassment if a supervisor conditioned a tangible job benefit on plaintiff's submission to a sexual demand, even if the supervisor never actually penalized

plaintiff for her failure to submit. Because *quid pro quo* liability based on such unfulfilled threats is incompatible with *Ellerth*, the District Court's instruction on this subject was erroneous.[1]

Even if the District Court's *quid pro quo* instruction could be read to require a finding that plaintiff actually suffered a tangible employment action as a result of her refusal to submit to her supervisor's sexual demands, the claim should not have been submitted to the jury because there is no evidence to support it. The only factual basis for plaintiff's *quid pro quo* claim is Madamba's statement to Hurley that women frequently sleep with their bosses in order to gain protection against sexual harassment. In the same conversation, Madamba also told plaintiff that he had lost weight by "having sex a few times a day" and that women came to him "when they're ready." Plaintiff

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[1] Citing the fact that the LAD is "in some respects broader and more flexible than Title VII," the majority suggests that the New Jersey Supreme Court may reject *Ellerth* and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), and adhere to the view that the loss of a tangible employment benefit is not an essential element of a *quid pro quo* claim under the LAD. Maj. Op. at n. 19. I wholeheartedly agree with the majority that the LAD is a remedial statute that should be liberally construed, but presented with no evidence that the New Jersey Supreme Court would reject two widely-heralded and watershed opinions of the United States Supreme Court, I believe the wiser course is to assume that the New Jersey Supreme Court will follow *Ellerth* and *Faragher*. Ironically, the majority abandons its expansive view of the LAD when it comes to predicting whether New Jersey law recognizes a cause of action against individual supervisors for their own acts of discrimination, even in the face of substantial evidence that New Jersey courts already recognize such a claim. *See Infra* Section II.A.

contends, quite plausibly, that this conversation was a solicitation for sex. But this does not establish a *quid pro quo* claim unless plaintiff also proves that she suffered a tangible employment action as a result of her refusal to submit to Madamba's advances. There is simply no proof of this. Plaintiff has never even alleged that there is a causal connection between her failure to submit to Madamba's advances and any tangible employment action that she may have suffered.[2] In light of *Ellerth*, plaintiff cannot maintain a *quid pro quo* claim, and defendants were entitled not to have this unsubstantiated theory submitted to the jury.

The majority, while conceding that plaintiff's *quid pro quo* claim is "the least tenable of Hurley's claims," Maj. Op. at 37, nevertheless attempts to justify its submission by suggesting that a reasonable jury could have determined that Madamba had plaintiff transferred from Charlie Platoon to a less desirable position in the Property and Evidence Unit because she refused his sexual advances. *Id.* at n.26. This theory, while imaginative, is without

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[2] The District Court suggested that there was sufficient evidence to support plaintiff's *quid pro quo* claim because plaintiff's refusal to submit to Madamba's advances arguably resulted in the loss of the "tangible job benefit of being free from harassment." *Hurley v. Atlantic City Police Dep't*, 933 F. Supp. 396, 408 (D.N.J. 1996). This is a misapprehension of the concept of a tangible employment action, as *Ellerth* makes clear. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 118 S. Ct. at 2268. "Being free from harassment" does not equate to any of these categories.

foundation in the record. Plaintiff has never argued, either to this Court or the District Court, that there was a nexus between that transfer and her failure to submit to Madamba's sexual advances.[3] And for good reasons. According to plaintiff, Madamba's sexual overtures to her occurred on March 26, 1990. Plaintiff testified that this date stood out in her mind because it was her husband's birthday. App. at A2497:4-6. But plaintiff was not transferred to the Property and Evidence Unit until November 8, 1990, approximately one week after she submitted a memorandum in which she detailed the harassment that she suffered at Charlie Platoon and *requested a transfer. Hurley*, 933 F. Supp. at 406. In addition, the transfer was authorized by the Acting Chief of Police, not by Madamba, who as a captain did not have the authority to transfer plaintiff or anyone else. Accordingly, while plaintiff has argued, and a reasonable jury could conclude, that plaintiff's transfer to the Property and Evidence Unit was in retaliation for her sexual harassment complaints, the notion that the transfer was somehow connected to plaintiff's failure to submit to Madamba's sexual advances over seven months earlier is implausible in the extreme, and no reasonable jury could so find based on the present record.

We are thus presented with a situation where a jury has returned a general verdict of liability against the

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[3] Plaintiff argued to the District Court that the "transfer was in retaliation for complaints of harassment." App. at A5428 (plaintiff's statement of contested facts). Likewise, plaintiff has argued to this court that the transfer resulted from her "complain[ts] of sexual harassment." Hurley Letter, July 20, 1998 at 2.

defendants, but one of the theories on which that verdict may have rested was both improperly presented and was not supported by the evidence. Under these circumstances, our precedents could not be more clear. "Where a jury has returned a general verdict and one theory of liability is not sustained by the evidence or legally sound, the verdict cannot stand because the court cannot determine whether the jury based its verdict on an improper ground." *Wilburn v. Maritrans GP Inc.*, 139 F.3d 350, 361 (3d Cir. 1998); *see also Brokerage Concepts v. U.S. Healthcare, Inc.*, 140 F.3d 494, 534 (3d Cir. 1998); *Limbach Co. v. Sheet Metal Workers Int'l Assoc.*, 949 F.2d 1211, 1217-18 (3d Cir. 1991) ("Under this court's jurisprudence, we must set aside a general verdict if it was based on two or more independent grounds one of which was insufficient, and we cannot determine whether the jury relied on the valid ground."), *aff'd on rehearing en banc*, 949 F.2d 1241 (3d Cir. 1991); *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1000 (3d Cir. 1988); *Avins v. White*, 627 F.2d 637, 646 (3d Cir. 1980); *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 967 (3d Cir. 1979); *Albergo v. Reading Co.*, 372 F.2d 83, 86 (3d Cir. 1967).

Our decision in *Carden*, 850 F.2d at 996, is illustrative. In that case, plaintiff sued his former employer for age discrimination. At trial, plaintiff pressed two different theories: first, direct evidence of intentional discrimination; and second, circumstantial evidence of discrimination under the burden-shifting analysis of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The jury returned a general verdict in plaintiff's favor. On appeal, defendants successfully argued that the only testimony supporting

plaintiff's intentional discrimination claim was erroneously admitted into evidence by the district court, and that without such testimony, there was insufficient evidence to support the claim of intentional discrimination. Although we recognized that there was more than sufficient evidence to support plaintiff's *McDonnell Douglas* claim, we nonetheless concluded that the general nature of the jury's verdict necessitated a new trial:

> Significantly, the jury's liability interrogatory, and hence the jury's answer, is in effect a general verdict. It did not distinguish between the two theories on which the district court charged: i.e. liability predicated on a finding of intentional discrimination, or liability predicated on an indirect finding grounded in the three-part McDonnell Douglas formula. Thus, unless we are satisfied that Carden proved both direct and indirect liability on the part of Westinghouse, we are compelled to reverse the judgment because the jury's verdict, general in nature, may have rested exclusively on a ground that is not supported by evidence. . . . *In our jurisprudence it has been established that a general verdict must be set aside where the jury has been instructed that it could rely on two or more independent grounds or claims and one of those grounds or claims turns out to be insufficient.*

Id. at 999-1000 (emphasis added) (internal citations omitted).

The Supreme Court has been equally consistent in holding that a general verdict in a civil case must be reversed if any of the claims submitted to the jury are found to be unsound. Over a century ago, the Court explained that the general verdict's "generality prevents

us from perceiving upon which plea they found. If, therefore, upon any one issue, error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld. . . . " *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884). Since *Baldwin*, the Supreme Court has reaffirmed this rule, without exception, on at least three separate occasions. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *United New York & New Jersey Sandy Hook Pilots Assoc. v. Kalecki*, 358 U.S. 613, 618-19 (1959); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78-79 (1907). Applying this well-settled principle to the facts of this case leads to the inevitable conclusion that the verdict against the ACPD and Madamba should be vacated because we do not know whether those defendants were found liable based on a *quid pro quo* theory that is both legally and factually defective.

Faced with the clear command of our prior cases, as well as the governing Supreme Court doctrine, the majority holds that even if plaintiff's *quid pro quo* claim was erroneously presented to the jury and lacked evidentiary support, the judgment against the ACPD should still be affirmed because, the majority declares, "no jury would have found the defendants liable based solely on [the] *quid pro quo*" claim, and therefore, "any error was harmless." Maj. Op. at 38. Although the majority claims that this is not a new rule, the fact of the matter is that prior to today's decision, this court has never relied on a harmless error analysis to affirm a general verdict that may have

rested on an improper ground.[4] It is remarkable that after more than one hundred years of reviewing civil judgments

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[4] The single Third Circuit decision cited by the majority in support of its position is inapposite. In *Murray v. United of Omaha Life Ins. Co.*, 145 F.3d 143 (3d Cir. 1998), our prediction of New Jersey law rendered the district court's jury charge erroneous, but we concluded that the jury verdict should nonetheless be affirmed because "the findings necessarily implied by the jury's verdict under the incorrect instructions make clear that the jury would have reached the same conclusion under the correct instructions. . . . " *Id.* at 145-46. Here, in contrast, there is nothing in the jury's general verdict that would support the notion that they would have reached the same result had the matter been submitted without the faulty *quid pro quo* claim. In addition, *Murray* was not a case involving a general verdict that may have been predicated on erroneous grounds, and it accordingly sheds no light on the issue presented herein.

I recognize that on rare occasion, some of our sister circuits, utilizing a harmless error analysis, have affirmed general verdicts that were tainted by defective claims. *See Kern v. Levolor Lorentzen, Inc.* 899 F.2d 772 (9th Cir. 1990); *Traver v. Meshriy*, 627 F.2d 934 (9th Cir. 1980); *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970); *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969). Most of the circuits, however, have strictly adhered to the general rule announced in *Baldwin*. *See Kern*, 899 F.2d at 790 (Kozinski, J., dissenting) (citing cases). In particular, I note that *Asbill v. Housing Authority of Choctaw Nation of Oklahoma*, 726 F.2d 14[illegible] (10th Cir. 1984), relied on by the majority for the allegedly "long [ ]acknowledged" proposition that *Baldwin* does not preclude the possibility of harmless error review, no longer represents the prevailing view of the Tenth Circuit. *See Anixter v. HomeStake Production Co.*, 77 F.3d 1215, 1229 (10th Cir. 1996) ("Although in the past we allowed jury verdicts to stand if the improper instruction was harmless . . . more recently we have adhered strictly to the general rule and have remanded cases where we could not say 'with absolute certainty' that the jury was not influenced by the submission of improper and

founded on general verdicts, the majority believes that we have only now come upon the case that calls for such drastic action. I do not believe that that day has arrived.

The majority concludes that the evidence to support plaintiff's hostile work environment claim – the sexually explicit graffiti and the sanitary napkin incident, in particular – is so strong that there is no possibility that the jury assessed liability against the ACPD based solely on Madamba's alleged sexual advances. No one, save the defendants perhaps, would dispute that plaintiff presented substantial evidence in support of her hostile work environment claim. But can any of us really purport to know how the jury viewed the evidence in this case? Any experienced trial lawyer can attest to the fact that juries sometimes view cases in suprising [sic] ways. Although one would not know it from the majority's opinion, according to the District Court, the facts in this matter were "hotly contested, and at trial there was conflicting evidence with respect to almost everything." *Hurley*, 933 F. Supp. at 404 n.4. For example, the defendants produced evidence that the graffiti, though by all accounts appalling, was promptly removed when ACPD

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erroneous instruction.") (citations omitted); *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1299-1301 (10th Cir. 1989) (acknowledging harmless error discussion in *Asbill*, but concluding that more recent cases left "no room for harmless error analysis," even though it was "very unlikely" that the erroneous jury instruction prejudiced defendant's "substantial rights"). In light of these cases, as well as the Supreme Court and Third Circuit precedents discussed in the text, I believe the majority's reliance on the sporadic harmless error cases from other circuits to be misplaced.

supervisory personnel learned of its existence. There was also evidence that the graffiti was directed at both male and female officers. The sanitary napkin incident was the subject of conflicting testimony as well: several police officers testified that Madamba, upon seeing the display, immediately had it taken down and adamantly instructed his officers to cease such behavior. The point, of course, is not whether my colleagues or I would have credited these explanations if we were jurors; it is that the actual jurors in this case, consistent with their oaths and the instructions of the District Court, could have accepted the ACPD's defense to the hostile work environment claim, but still assessed liability on the faulty *quid pro quo* claim because they were convinced that Madamba propositioned Hurley for sex and threatened to retaliate if she did not submit. To recognize that this scenario may have occurred does not presume "total illogic" on behalf of the jury, as the majority asserts. Maj. Op. at 38. To the contrary, it assumes only that the jury carefully considered the evidence and followed the instructions of the District Court.[5]

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[5] Even assuming that the jury did not find the ACPD and Madamba liable solely on the defective *quid pro quo* claim, its submission could have effected the jury's deliberations in less obvious ways. For example, the jurors may have been inclined to award more compensatory damages because they wrongly believed that the defendants had committed multiple forms of sexual harassment against plaintiff. The fact that the District Court felt compelled to remit the compensatory damages award from $575,000 to $175,000 is some indication that this may have occurred.

The invocation of a harmless error rule in this case is particularly misguided because it will produce no benefit to either the judicial system or the parties. As the Supreme Court has recognized, the chief justification of the harmless error doctrine is the conservation of judicial resources. *See United States v. Hastings*, 461 U.S. 499, 509 (1983) (quoting R. Traynor, *The Riddle of Harmless Error* 81 (1970)); *see also* 11 Wright et al., *Federal Practice and Procedure* § 2881 at 443 ("The theory of the harmless-error rule generally is that procedure is a practical means to an end, the requirements of which should be no more exacting than efficiency requires."). But in this case, as a consequence of our decision to vacate the punitive damages award against the ACPD and the liability judgments against Madamba and in favor of Rifice, the entire matter will have to be re-presented to a new jury. There is thus no efficiency advantage to support the majority's approach. Nor will the parties themselves be well-served by today's decision. The ACPD, for obvious reasons, would rather present their evidence to a new jury without defending against an unsubstantiated claim. Even the plaintiff, however, by being deprived of an opportunity to have a single jury review all of her claims and, if appropriate, assess both compensatory and punitive damages, will be disadvantaged by the majority's limited affirmance of only the remitted compensatory damages award against the ACPD.

Finally, I am very concerned that the majority's newly-minted harmless error analysis will invite further efforts by appellate judges, in even more difficult cases, to divine what a jury may have been thinking when it

rendered a general verdict. Although the majority emphasizes that their decision to employ a harmless-error doctrine is founded upon the "extreme" facts of this case, Maj. Op. at 41, that is simply to say that we will only affirm a tainted general verdict in the future where we believe that the jury has reached an obviously correct result. Because I believe that we have no role in speculating how a jury might have viewed the evidence presented at trial, and that such attempts at judicial telepathy are unwise and contrary to our precedents, I respectfully dissent from the majority's decision to affirm the judgment against the ACPD.

II. *Individual Liability Under the New Jersey Law Against Discrimination*

A.

In ordering a new trial for defendants Rifice and Madamba, the majority has concluded that the only basis for individual liability under the LAD is § 10:5-12(e), which prohibits any person from aiding and abetting an act prohibited by the LAD. In reaching this conclusion, the majority has predicted that the New Jersey Supreme Court would not recognize a cause of action against an individual supervisor under § 10:5-12(a), which makes it unlawful for any "employer" to discriminate on the basis of, among other things, sex. Maj. Op. at 45-46. The majority believes that interpreting § 10:5-12(a) to provide for individual liability of supervisors would not substantially further the purposes of anti-discrimination law and would be inconsistent with the prevailing interpretation

of Title VII, which does not give rise to individual liability. *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077-787 (3d Cir. 1996). Because I find these reasons unconvincing in light of the many New Jersey state court cases which strongly suggest that New Jersey law recognizes a cause of action against individual supervisors for their own acts of discrimination, I dissent from the majority's holding to the contrary.

At the outset, it is worth noting that, viewed purely as a matter of statutory construction, there is a more than credible argument that the term "employer," as used in N.J.S.A. § 10:5-12(a), was intended to encompass individual supervisors. The governing definition of "employer" under the LAD is found at N.J.S.A. § 10:5-5(e) and provides as follows:

> 'Employer' includes all persons as defined in subsection (a) of this section unless otherwise specifically exempt under another section of this act, and includes the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies.

Subsection (a) of § 10:5-5, in turn, states:

> 'Person' includes one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.

Based on these definitions, which indirectly define an "employer" as "one or more individuals," it is reasonable to conclude, as plaintiff urges, that the New Jersey legislature intended to include individuals acting on behalf of their employer (i.e., supervisors) within the coverage of

the statute. This is particularly so given the legislature's instruction that the LAD is to be "liberally construed," N.J.S.A. § 10:5-3, and the New Jersey Supreme Court's repeated recognition that "the goal of the LAD [is] 'nothing less than the eradication of the cancer of discrimination.' " *See Taylor v. Metzger*, 706 A.2d 685, 693 (N.J. 1998) (*quoting Hernandez v. Region Nine Hous. Corp.*, 684 A.2d 1385 (N.J. 1996)) (additional citations omitted). Indeed, in this case, plaintiff has an especially compelling argument that defendants Rifice and Madamba ought to be subject to liability under § 10:5-12(a) because "public officers" are specifically included in the § 10:5-5(e) definition of "employer." Although "public officers" is not defined in the LAD, it is difficult to conceive of a definition of that term that does not encompass a police inspector and a police captain, which are, respectively, the second and third highest ranking positions in the Atlantic City Police Department.

All of this is to say that, even if we did not have the benefit of New Jersey state court decisions and were completely left to our own devices, the question of whether Rifice and Madamba could be liable under LAD § 10:5-12(a) is, as the majority acknowledges, a close one. Maj. Op. at 45-46. *But see Tyson v. CIGNA Corp.*, 918 F. Supp. 836, 839 (D.N.J. 1996) (holding that § 10-5:12(a) does not provide for individual liability because it "does not include any of the phrases that so clearly provide a basis for individual liability under other subparts" of LAD). In matters involving state law, however, our role is not to interpret a statute as we deem it appropriate; instead, we must apply the law in a manner that is consistent with the interpretation given to it by the state's

highest court. Where, as here, the New Jersey Supreme Court has not explicitly addressed the issue, we must "forecast the position" of that court. *Clark v. Modern Group Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993). In doing so, we should consider, *inter alia*, decisions of the New Jersey intermediate appellate courts as well as "[t]he 'carefully considered statement[s]' of the Supreme Court in dicta." *Travelers Indem. Co. of Illinois v. Dibartolo*, 131 F.3d 343, 348 (3rd Cir. 1997) (*quoting McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 662 n. 21 (3d Cir. 1980)).

There have been at least four decisions of the New Jersey Supreme Court in which individual supervisors were sued under the LAD for their own discriminatory acts. *See Taylor v. Metzger*, 706 A.2d 685 (N.J. 1998); *Payton v. New Jersey Turnpike Authority*, 691 A.2d 321 (N.J. 1997) (employee brought LAD action against her employer and two of her supervisors for sexual harassment); *Montells v. Haynes*, 627 A.2d 654 (N.J. 1993) (employee brought suit against employer, supervisor, and others asserting claims for personal injuries and sexual harassment under the LAD); *Lehman 'R' v. Toys Us, Inc.*, 626 A.2d 445 (N.J. 1993) (former employee brought action against employer, supervisor, and personnel director, alleging hostile work environment sexual harassment in violation of the LAD). Most recently, in *Taylor*, 706 A.2d 685, the Supreme Court permitted plaintiff, a county sheriff's officer, to sue the county sheriff, her supervisor, for creating a racially hostile work environment based on the sheriff's use of the term "jungle bunny" to describe plaintiff. The central legal issue addressed in *Taylor* was whether the utterance

of a single derogatory racial comment by a supervisor could support a hostile work environment claim under the LAD, but implicit in the decision is the proposition that a supervisor is liable for his or her own discriminatory behavior. This follows from the court's observation that: "[a] supervisor has a unique role in shaping the work environment. Part of a supervisor's duty is to prevent, avoid, and rectify invidious harassment in the workplace." *Id.* at 691. Although the majority relies on *Taylor* for its conclusion that a supervisor can be liable as an aider and abettor of discrimination under LAD § 10:5-12(e), nowhere in the *Taylor* opinion does the court characterize the defendant as an aider and abettor or suggest that any other individual or entity is principally liable. Given this omission, the more reasonable inference to draw from *Taylor*, as well as the other cases in which supervisors were sued in their individual capacities under the LAD, is that the Supreme Court has endorsed the concept of supervisory liability under LAD § 10:5-12(a).

The decisions of the Appellate Division support an identical conclusion. *Muench v. Township of Haddon*, 605 A.2d 242 (App. Div. 1992), is particularly instructive. In that case, plaintiff alleged that while working as a probationary dispatcher with the Haddon Township Police Department, she was subjected to a hostile work environment by Joseph Tortoreto, a police officer who had been assigned to train her. Despite plaintiff's complaints to Chief of Police Robert Saunders and Tortoreto's supervisor, Sergeant Walter Aaron, the harassment continued until plaintiff was forced to resign. Plaintiff then brought suit under the LAD against Haddon Township, the

Haddon Police Department, Chief Saunders, Sergeant Aaron, and Tortoreto. While the main legal issue in the case was whether plaintiff could maintain a hostile work environment claim in the absence of overt sexual conduct, the court's opinion, which cites, quotes, and discusses § 10:5-12(a), *Id.* at 246, but not the aiding and abetting provision of § 10:5-12(e), makes plain that supervisors are individually liable under the LAD. As the court stated:

> [T]here is no question that 'management-level employees,' Chief Saunders and Sergeant Aaron, had been told by plaintiff of Tortoreto's conduct during plaintiff's probationary period, and that no corrective steps were taken. Indeed, the trial court found that plaintiff complained to the chief 'on two occasions' and the chief did nothing about it. Since the evidence established that supervisory personnel were on notice of the alleged harassment and failed to take corrective steps, defendants, including Haddon Township, are subject to liability under the LAD.

Id. at 249.

Other decisions of the Appellate Division likewise support the notion of individual supervisory liability under LAD § 10:5-12(a). *See Maiorino v. Schering-Plough Corp.*, 695 A.2d 353 (App. Div. 1997) (affirming judgment of compensatory damages in LAD action against plaintiff's former employer and supervisors); *Herbert v. Haytaian*, 678 A.2d 1183 (App. Div. 1996) (state employee brought LAD claim for sexual harassment against the State of New Jersey and former speaker of the General Assembly); *Wilson v. Parisi*, 633 A.2d 113 (App. Div. 1993) (reversing grant of summary judgment to defendants in

LAD sexual harassment claim brought by high school teacher against high school principal and board of education).

In sum, the above cases provide more than ample evidence that, under LAD § 10:5-12(a), a supervisor may be individually liable for his or her own discriminatory acts. I would therefore hold that on remand, defendants Rifice and Madamba are subject to individual liability under LAD § 10:5-12(a), as well as the aiding and abetting provision of LAD § 10:5-12(e). While I do not reject the possibility that the New Jersey Supreme Court, when squarely presented with this issue in a future case, could decide otherwise, I am convinced that, given our obligation to be sensitive to the doctrinal trends of the state courts in the application of state law, the majority has erred in its prediction on this subject. I therefore dissent.

B.

Finally, I do not agree with the majority's decision to affirm the District Court's grant of summary judgment to defendant Mooney. LAD § 10:5-12(e) provides that it is unlawful "for any person, whether an employer and employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or attempt to do so." This provision could not be more clear in creating liability for *any* person who aids and abets a violation of the act, whether the individual is a supervisor, a nonsupervisory employee, or even an individual who is not an employee of the entity that is principally liable for discrimination.

Despite the broad scope of the statute, the majority takes the position that a nonsupervisory employee cannot be liable as an aider and abettor for his own affirmative acts of harassment because "such affirmative acts do not substantially assist the employer in *its* wrong, which is its failure to prevent and redress harassment by individual employees." Maj. Op. at 53 (emphasis in original). This statement is correct as far as it goes, but it overlooks the fact that in many sexual harassment cases, including this one, the employer's wrong is *not* only its failure to prevent and redress harassment by individual employees. An employer also commits a wrong when its supervisors, whose conduct is generally attributable to an employer because of their position in the organization, engage in harassing behavior. *See Ellerth*, 118 S. Ct. at 2270; *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292 (1998). It follows then that anyone who aids and abets harassment perpetrated by a supervisor that is attributable to an employer can themselves be liable under LAD § 10:5-12(e).

Accordingly, while I agree with the majority that, as a nonsupervisory employee, Mooney cannot be said to have aided and abetted the ACPD in failing to respond to his own acts of sexual harassment, that lone observation does not settle the question of Mooney's liability. Contrary to the majority's view, the ACPD is not liable to plaintiff solely for its failure to prevent and remedy a hostile work environment; a reasonable jury could also find that the ACPD is liable to plaintiff on her hostile work environment claim based on Captain Madamba's affirmatively harassing actions, which, given his high rank, are attributable to the ACPD. To the extent then that Mooney aided and abetted Madamba in creating a hostile

work environment, Mooney should be subject to liability under LAD § 10:5-12(e). Under our decision in *Failla v. City of Passaic*, 146 F.3d 149 (3d Cir. 1998), the relevant inquiry is whether Mooney "knowingly [gave] substantial assistance or encouragement" to Madamba's alleged discriminatory actions. *Id.* at 158. In my view, the evidence in the record is sufficient to support such a finding. For example, plaintiff testified that Mooney, in Madamba's presence, remarked that he had heard that Hurley "liked them hard and stiff." On another occasion, when plaintiff complained to Madamba that someone had stolen her coffee cup, Mooney asked plaintiff whether she wanted to drink out of his jock cup. App. at A2514. Madamba apparently did not rebuke Mooney at all for this behavior. Viewing this evidence in a light most favorable to plaintiff, a reasonable jury could find that Mooney gave substantial assistance or encouragement to Madamba's unlawful acts of harassment. The District Court's grant of summary judgment to Mooney should therefore be reversed.

III.

For the reasons stated above, I would vacate the judgment against the ACPD and remand for a new trial. In addition, while I agree that the case should be retried with respect to defendants Rifice and Madamba, on retrial, I would permit plaintiff to proceed against them under N.J.S.A. § 10:5-12(a) as well as N.J.S.A. § 10:5-12(e).

I would also reverse the grant of summary judgment in favor of defendant Mooney. I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed May 11, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-5633, 96-5634, 96-5661, 96-5783

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
husband and wife,

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA, NICHOLAS V. RIFICE,
JOHN MOONEY; JOHN DOES 1 THROUGH 50
inclusive, fictitious name defendants, jointly,
severally and in the alternative

(Camden New Jersey District Civil No. 93-260)

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
wife and husband

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
JOHN MOONEY; JOHN DOES 1 THROUGH 50,
inclusive, fictitious name defendants, jointly, severally,
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(Camden, New Jersey District Civil No. 94-1122)

Atlantic City Police Department,
Appellant No. 96-5633

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
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Henry Madamba,
Appellant No. 96-5634

SERGEANT DONNA M. HURLEY; PATRICK K. HURLEY,
husband and wife

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a subdivision of the City of Atlantic City;
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(Camden, New Jersey District Civil No. 94-1122)

Donna M. Hurley, and Patrick K. Hurley,
Appellants No. 96-5738

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Nos. 93-cv-00260, 94-cv-01122)

Argued May 4, 1998
Reargued October 5, 1998

BEFORE: BECKER, Chief Judge, SCIRICA and COWEN,
Circuit Judges

(Filed March 18, 1999)

ORDER AMENDING OPINION

The slip opinion in the above case filed on March 18, 1999 is hereby amended as follows:

1. The last sentence of Section IV.B, at page 52 of the slip opinion, "We will therefore vacate the judgment in

favor of Rifice and the district court's order striking plaintiff's punitive damage claim against Rifice," is amended to strike the words following "in favor of Rifice." The sentence will read: "We will therefore vacate the judgment in favor of Rifice."

2. After the amended sentence, a new footnote is added: "We intimate no view as to whether a punitive damages claim against Rifice will be viable under the principles articulated today. In view of the standard of liability we have articulated, we think it better to leave this issue to the District Court on remand."

BY THE COURT:

/s/ Edward R. Becker
Chief Judge

DATED: May 11, 1999

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Appellant No. 96-5633

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Henry Madamba,
Appellant No. 96-5634

SERGEANT DONNA M. HURLEY;
PATRICK K. HURLEY, husband and wife

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THE ATLANTIC CITY POLICE DEPARTMENT,
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Donna M. Hurley, and Patrick K. Hurley,
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SERGEANT DONNA M. HURLEY;
PATRICK K. HURLEY, husband and wife

v.

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(Camden, New Jersey District Civil No. 94-1122)

Donna M. Hurley, and Patrick Hurley,
Appellants No. 96-5738

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Nos. 93-cv-00260, 94-cv-01122)

Present: Becker, *Chief Judge*, Scirica and Cowen, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel on May 4, 1998 and reargued on October 5, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the amended judgment of the said District Court entered, be, and the same is hereby affirmed insofar as it imposes liability on the Atlantic City Police Department ("ACPD"). The amended judgment is vacated to the extent it awards punitive damages against the ACPD and a new trial is ordered on that issue. The amended judgments entered against defendant Henry Madamba and in favor of defendant Nicholas V. Rifice are vacated, but the District Court's order granting defendant John Mooney's motion for summary judgment is affirmed. The District Court's orders dismissing Patrick K. Hurley's loss of consortium claim, denying plaintiff's motion for prejudgment interest and an additur, and

granting plaintiff's motion for attorney's fees subject to a reduced hourly rate are affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sisk
Clerk

Dated: MAR 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-5633, 96-5634, 96-5661, 96-5783

SERGEANT DONNA M. HURLEY;
PATRICK K. HURLEY, husband and wife

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(Camden, New Jersey District Civil No. 94-1122)

Atlantic City Police Department,
Appellant No. 96-5633

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HENRY MADAMBA; NICHOLAS V. RIFICE;
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inclusive, jointly, severally, and in the alternative

(Camden, New Jersey District Civil No. 94-1122)

Henry Madamba,
Appellant No. 96-5634

SERGEANT DONNA M. HURLEY;
PATRICK K. HURLEY, husband and wife

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
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Wife and husband

v.

THE ATLANTIC CITY POLICE DEPARTMENT,
a subdivision of the City of Atlantic City;
HENRY MADAMBA; NICHOLAS V. RIFICE;
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inclusive, jointly, severally, and in the alternative

(Camden, New Jersey District Civil No. 94-1122)

Donna M. Hurley, and Patrick K. Hurley,
Appellants No. 96-5661

SERGEANT DONNA M. HURLEY;
PATRICK K. HURLEY, husband and wife

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inclusive, jointly, severally, and in the alternative

(Camden, New Jersey District Civil No. 94-1122)

Donna M. Hurley, and Patrick Hurley,
Appellants No. 96-5738

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Nos. 93-cv-00260, 94-cv-01122)

Present: BECKER, *Chief Judge*, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO ROTH, LEWIS, McKEE, RENDELL, and COWEN,* *Circuit Judges*.

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petitions for rehearing filed by the Appellant Atlantic City Police Department and the Appellee Nicholas V. Rifice, and having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

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* As to panel rehearing only.

rehearing by the court *en banc,* the petitions for rehearing are DENIED.

BY THE COURT:

/s/ Edward R. Becker
Chief Judge

DATED: May 11, 1999

Sergeant Donna M. HURLEY, Plaintiff,

v.

The ATLANTIC CITY POLICE DEPARTMENT, Henry Madamba, and Nicholas Rifice, Defendants.

Civil Action Nos. 93-260 (JEI), 94-1122 (JEI).

United States District Court, D. New Jersey.

July 12, 1996.

Van Syoc Law Offices, Chartered by Clifford L. Van Syoc (argued), Cherry Hill, NJ, for Plaintiffs.

Tuohy & Tuohy by Dennis M. Tuohy (argued), Michael Blee (argued), Atlantic City, NJ, for Defendant Atlantic City Police Department.

Barry & McMoran, P.C. by Madeline Cox, Mark Falk (argued), Newark, NJ, for Defendant Henry Madamba.

Hankin Sandson & Sandman, P.C. by Thomas F. Bradley (argued), Atlantic City, NJ, for Defendant John Mooney.

Marshall, Dennehey, Warner, Coleman & Goggin by Richard L. Goldstein (argued), Marlton, NJ, for Defendant Nicholas Rifice.

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IRENAS, District Judge:

Following a sexual discrimination trial which lasted from November 27, 1995, through February 13, 1996, and which resulted in a jury verdict finding liability against defendants Henry Madamba and the Atlantic City Police Department ("ACPD"), defendants move for a new trial based on insufficiency of the evidence and alleged errors in evidentiary rulings, legal decisions, and the jury charge. In the alternative, defendants seek remittitur of the $575,000 in compensatory damages awarded against Madamba and the ACPD and the $700,000 in punitive damages awarded against the ACPD. Because the findings of the jury were supported by substantial evidence and the trial was not infected by prejudicial error, defendants' motions for a new trial will be denied. Their motions for remittitur will be granted with respect to the compensatory damages, which shall be remitted from $575,000 to $175,000, but denied as to punitive damages.

Defendants Rifice and Mooney, as well as plaintiff, move for counsel fees as prevailing parties under the relevant fee-shifting statutes. Both defendants' fee petitions will be denied because plaintiff's suit against them was not baseless, but plaintiff's application will be granted, subject to its submission to the Court, within three weeks of the date of this opinion, of revised

timesheets which exclude hours spent in pursuit of unsuccessful claims and parties.

I. INTRODUCTION

At the heart of Donna Hurley's case is the claim that she faced a hostile work environment. Unlike other forms of sexual discrimination, employer liability for a hostile work environment is created not by the random crude acts of employees, but rather by the employer's reaction or non-reaction to these acts. As women increasingly enter workplaces historically reserved for men, particularly those which value traditionally "male" virtues such as physical strength and courage, it is not surprising that some male employees will by word or deed display their displeasure at this female "intrusion." An employer cannot sit back and adopt a "boys will be boys" attitude when this happens; it must move promptly and forcibly to make it clear to the entire workforce that conduct which demeans women or makes them feel unwelcome will not be tolerated. The jury's verdict in this case suggests that the ACPD did not understand its obligation to its female employees.

At trial, defendant Henry Madamba referred to the bulk of the harassment Donna Hurley faced as "childish stuff,"[1] and his attorneys continue to insist that although the conduct to which Donna Hurley was exposed during her career at the ACPD "was childish, it was not

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[1] Trial Transcript at page 4332. Subsequent references to trial testimony will be cited in the body of the opinion to the page on which they may be found.

egregious."[2] This characterization exemplifies the attitude Donna Hurley faced from the day she joined the ACPD. The ACPD leadership ignored the misogyny that pervaded her working environment, underestimated its hurtfulness, and failed to take appropriate remedial action.

The ACPD's apathetic attitude was apparent even at trial. The ACPD referred extensively to its written anti-harassment policies, which were developed, for the most part, after the events at issue in the case. But written policies do not change behavior; actions do. The ACPD is

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[2] Madamba Brief at 1. An example of the "childish" harassment to which Hurley was exposed was found in a commonly used ACPD bathroom that was open to the public:

> Oh sweet Donna Hurley
> With cunt hair so curley
> Your blond hair seems so soft and stays in place
> When I toss off my cookies in your face
> I'd like to stick my cock in your ass
> But when I think of Lt Andros my cock gets soft fast
> So keep up your spirits and don't get depressed
> Cause even though your a cunt I'd like to press your flesh
> Though in uniform your rude and brass
> your just another sex machine with my cock in your ass

Next to this semi-literate smut was a graphic drawing of a naked woman labelled "Donna Hurley" and bearing sergeant's stripes. Near the drawing, and apparently written by several different hands, were the scrawled phrases "just another fuck doll," "she should look this good," and "Lt Andros was here." (Lieutenant Andros was a co-worker with whom Hurley was rumored to have had an affair.) Plaintiff cut out the portion of drywall on which this graffiti was displayed, about a square meter in size and an inch thick, and introduced the wall itself into evidence as Exhibit P-1. Describing such a targeted assault as childish drastically underestimates its potential for harm.

a disciplined, hierarchical organization with the authority to enforce its policies. Unfortunately, it appears to have drafted the policies primarily in order to hide behind them, not to change behavior.

The ACPD pointed out repeatedly during trial that every time Hurley complained of bathroom graffiti, the ACPD painted over the wall. Yet it concedes that it never conducted an investigation into the harassment. (Tr. 152.) It never punished anyone. (Tr. 262.) It never even asked the patrol officers, as a group, to stop. And the pace at which the ACPD painted over the graffiti was measured in weeks or months rather than, as it should have been, in minutes. Indeed, throughout the trial the ACPD's attorney, by his questions to witnesses, repeatedly suggested that sexual graffiti was not even an issue of sexual harassment, but merely a matter of defacing public property.

The ACPD argues that it could never have caught the culprits behind the drawings. Whether true or not, this misses the point. Until 1992, when technology improved, the ACPD could not catch the malefactors (Tr. 3182) who engaged in the ubiquitous practice of using their handheld radios to disconnect the radio conversations of their colleagues and supervisors, known as "keying out" or "clicking out."[3] But this did not prevent the ACPD from trying, especially when senior supervisors were affected.

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[3] "Keying out" or "clicking" consists of depressing the "On" and "Off" buttons of a radio transmitter to effectively block the communication of the officer who is using the airwave. In a December 6, 1984, General Order, the ACPD indicated that keying out would be subject to "[s]trict disciplinary action."

Unlike lewd drawings and vile comments, which Madamba viewed merely as "prankish," (Tr. 4332), "clicking out" was a practice that really "pissed off" Madamba. (Tr. 4255). He and others took strong action to stop it. (Tr. 4255.) ACPD senior officers conducted investigations (Tr. 4255), wrote reports (Tr. 4497), and threatened at roll call to discipline anyone caught doing it (Tr. 612, 647-648). The ACPD's reaction to "clicking out" thus stands in sharp contrast to its apathy in the face of overwhelming evidence that Donna Hurley was the victim of sexual harassment.

II. THE MOTIONS BEFORE THE COURT

Defendant ACPD moves for a new trial or remittitur on the grounds that: (1) the Court's admission of evidence of harassment directed towards other women was prejudicial error; (2) the Court's admission of evidence that predated the statute of limitations was error; (3) the Court's admission of remarks hostile to women that were made outside the presence of plaintiff or any other female officer was error; (4) the jury's award of punitive damages against the ACPD was inherently inconsistent with its decision not to award punitive damages against Madamba; and (5) the Court's jury charge was misleading.

Defendant Madamba moves for a new trial or remittitur on the grounds that: (1) the evidence against him was insufficient to support a finding of liability; (2) the compensatory damage award was grossly excessive; (3) the Court erred in admitting evidence of incidents that occurred prior to the statutory period or outside the

hearing of plaintiff; (4) Dr. Hoyme's testimony constituted a surprise and prejudiced Madamba; and (5) the jury instructions were erroneous.

Defendant John Mooney, who was dismissed from this case on summary judgment, moves for counsel fees. Defendant Nicholas V. Rifice, against whom the jury found no liability, also moves for counsel fees. Plaintiff moves for counsel fees, for a new trial against Rifice, and for a new trial on the issue of punitive damages only with respect to Madamba.

All of the above motions will be denied, except that compensatory damages will be remitted by $400,000, and plaintiff's attorney will be awarded counsel fees in an appropriate amount.

III. STANDARD OF REVIEW FOR NEW TRIAL

The standard for granting a motion for a new trial pursuant to Fed.R.Civ.P. 59 is less demanding than that for a judgment as a matter of law under Fed.R.Civ.P. 50(a). *Lightning Lube, Inc. v. Witco Corp.*, 802 F. Supp. 1180, 1185 (D.N.J. 1992) (citing 9 Charles A. Wright & Arthur A. Miller, *Federal Practice and Procedure* § 2531, at 575 (1971)). Although a trial court has narrow discretion when ruling on a motion for judgment as a matter of law, a trial court ruling on a motion for a new trial is vested with wide discretion.

In ruling on a motion for a new trial, the trial court is permitted to consider the credibility of witnesses and to weigh the evidence. Where a motion for a new trial is based primarily on the weight of the evidence, however,

the trial court's discretion is more limited. A court should grant such a motion "only if the record shows that the jury's verdict resulted in a miscarriage of justice, or when the verdict, on the record, cries out to be overturned or shocks the conscience." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1353 (3d Cir. 1991). Because of the time-honored authority of the jury to render a verdict based on its collective wisdom, *New Market Inv. Corp. v. Fireman's Fund Ins. Co.*, 774 F. Supp. 909, 917 (E.D. Pa. 1991), the trial court must exercise restraint to avoid usurping the jury's primary function. *Borbely v. Nationwide Mutual Ins. Co.*, 547 F. Supp. 959, 980 (D.N.J. 1981). The Court must proceed with caution because:

> [When a] trial judge grants a new trial on the ground that the verdict was against the weight of the evidence, the judge . . . substitutes his own judgment of the facts and credibility of the witnesses for that of the jury. . . . Such an action effects a denigration of the jury system. Thus, close scrutiny is required in order to protect the litigant's right to a jury trial.

Lind v. Schenley Industries Inc., 278 F.2d 79, 90 (3d Cir. 1960). Appellate deference to the trial judge's decision is normally appropriate because it is the district court that was able to observe the witnesses and follow the trial in a way that an appellate court cannot replicate by reviewing a cold record. *Id.*; *Roebuck v. Drexel University*, 852 F.2d 715 (3d Cir. 1988), citing *Semper v. Santos*, 845 F.2d 1233, 1237 n. 5 (3d Cir. 1988).

Although Fed.R.Civ.P. 59 does not enumerate the bases for a new trial, the following have been recognized as being among them: the verdict is against the clear

weight of the evidence; damages are excessive; the trial was unfair; and substantial errors were made in the admission or rejection of evidence or the giving or refusing of instructions. *Lightning Lube*, 802 F. Supp. at 1186.

IV. PROCEDURAL HISTORY

On July 10, 1992, plaintiff filed complaints with both the United States Equal Employment Opportunity Commission ("EEOC") and the New Jersey Department of Law and Public Safety, Division of Civil Rights ("DCR"). Both complaints named the ACPD as the sole respondent and alleged that plaintiff had been harassed while on Charlie Platoon and retaliated against since then. However, an affidavit submitted in connection with the EEOC complaint alleged harassment by both Madamba and Mooney during plaintiff's stay on Charlie Platoon. She also alleged that obscene drawings of her remained visible as late as March of 1992, and that her transfer to the Property & Evidence Unit and the denial of her three-percent pay raise were in retaliation for her complaints of sexual harassment.

On January 20, 1993, before the EEOC had issued plaintiff a right-to-sue letter pursuant to 42 U.S.C. § 2000e-5(f)(1), plaintiff and her husband, Patrick Hurley, filed the complaint in Civ. No. 93-260, alleging a violation of 42 U.S.C. § 1983 and various common law contract, tort, and New Jersey statutory claims, including violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* ("NJLAD"), and the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq.*

("CEPA"). On October 12, 1993, the EEOC issued a determination on plaintiff's charge. The EEOC investigator found probable cause for violations of Title VII due to the sexual harassment of plaintiff while she was on Charlie Platoon, but no probable cause for retaliation in the transfer to the Property & Evidence Unit and the denial of the three-percent pay increase.

On March 7, 1994, plaintiff and her husband filed the complaint in Civ. No. 94-1122. This complaint makes no factual allegations, but merely relies on the facts stated in No. 93-260 and alleges discrimination pursuant to 42 U.S.C. § 2000e-2 and retaliation pursuant to § 2000e-3(a). On April 11, 1994, the case was consolidated with Civ. No. 93-260.

On September 24, 1994, plaintiff filed another complaint with the EEOC and the DCR, alleging that since June 10, 1994, she had been subject to retaliation as a result of her initial harassment charge. The events on which this charge were based were not the subject of this lawsuit.

In April 1995, following enormously extensive discovery involving some 70 volumes of deposition testimony, including more than twenty days for depositions of plaintiff and her husband, each of the original defendants – Captain Henry Madamba, Captain John Mooney, Chief Nicholas Rifice, and the ACPD – moved for summary judgment. On August 4, 1995, we granted summary judgment in favor of defendant Mooney. All claims against Madamba and Rifice were dismissed with the exception of claims under the NJLAD. All claims against

the ACPD were dismissed except for hostile work environment under Title VII, 42 U.S.C. § 1983, and the NJLAD. The liability portion of the trial was conducted in this case from November 27, 1995, through February 2, 1996. At the conclusion of the liability portion of the trial, the jury rendered a verdict against Madamba and the ACPD but found no liability against Rifice. They awarded $575,000 in compensatory damages and elected to award punitive damages against the ACPD but not against Madamba. On February 13, 1996, a punitive damage hearing was conducted before the jury, at the end of which the jury awarded plaintiff $700,000 in punitive damages.

V. FACTUAL BACKGROUND[4]

Plaintiff Donna Hurley is an Atlantic City police officer. The ACPD presently has 428 officers, each of whom reports through a chain of command: Patrol Officer to Sergeant to Captain to Inspector to the Chief of Police.

Hurley alleges that she was subjected to sexual harassment as early as her training in the Police Academy in the mid-1970s. She also alleges that in 1981, she was subject to harassment by then-Sergeant Walter Reay.[5]

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[4] The facts in this case are hotly contested, and at trial there was conflicting evidence with respect to almost everything. Because we are required to give deference to the jury's finding of liability, in this opinion we will present primarily the plaintiff's account of events to the extent evidence in the record supports it.

[5] Plaintiff alleges that Reay would make inappropriate comments about her hygiene during roll call, would disturb her while she was changing in the drill room, would speak to her in

Plaintiff alleges that for most of her career she was given lowly positions that offered no useful experience or potential for advancement. As a patrol officer, she was assigned to security desk duty (Tr. 2422), which consisted of signing civilians in and out of the department building, and fire watch (Tr. 2423), which consisted of watching one particular building for an outbreak of fire. Neither of these positions offered her the experience needed to advance.

Ms. Hurley began her career at the ACPD in February of 1978, and was promoted to Sergeant in November of 1987. (Tr. 2427.) She became the first woman Sergeant at the ACPD. As a Sergeant, plaintiff alleges that, other than a three-week stint in the detective bureau (Tr. 2431), her assignments continued to be menial. From the detective bureau she was transferred to court liaison officer (Tr. 2438) and from there to the juvenile truancy task force (Tr. 2463-65), where her job was to keep statistics on juvenile truants and where, although a sergeant, she supervised no one.

In late 1989 and early 1990, while plaintiff was assigned to the 8:00 a.m. to 4:00 p.m. shift, or the "Alpha Platoon,"[6] plaintiff filled out a shift preference sheet indicating that she wished to remain on her current shift.

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condescending tones during radio transmissions, and held her to stricter standards regarding leaving her post than other officers.

[6] ACPD divides its officers into three shifts: 8:00 a.m. to 4:00 p.m., or "Alpha Platoon"; 4:00 p.m. to 12:00 midnight, or "Bravo Platoon"; and midnight to 8:00 a.m., or "Charlie Platoon."

However, on January 3, 1990, she was instead transferred to become desk sergeant of Charlie Platoon, the midnight to 8:00 a.m. shift. Plaintiff testified that Charlie Platoon was her last choice in shifts.

Once transferred to Charlie Platoon, plaintiff came under the direct command of defendant Captain Henry Madamba. During her first week under Captain Madamba, he allegedly told her that "they" sent a woman to his unit to "break my balls" (Tr. 2750), and that he did "not expect [plaintiff] to be here on this shift very long." He instructed plaintiff to request a hardship transfer due to her family obligations, but plaintiff refused, in part because she believed it might hurt her professionally (Tr. 2752.) Plaintiff also claims that Sergeant Fair, who was transferred to Alpha Platoon, was given more favorable days off than she even though he had less seniority. (Tr. 2753.)

Plaintiff alleges that she was harassed throughout her tour on Charlie Platoon. This included "keying out" of her radio transmissions, demeaning comments by Madamba during roll call, and exclusion from supervisors' meetings attended by other sergeants. (Tr. 2780.) Furthermore, sexually explicit and demeaning drawings of and doggerel about plaintiff were carved into and drawn on the walls of the roll call room, the roll call bathroom, and the bathroom of the Masonic Temple, a building used by both ACPD employees and the public. (Tr. 2764.) A sanitary napkin with sergeant's stripes was hung over the roll call podium used by plaintiff and stayed there for three days. (Tr. 2761.)

Plaintiff also alleges that Madamba personally harassed her while she was on Charlie Platoon. In addition to insulting her at roll call and excluding her from sergeants' meetings, he allegedly refused to take action against those who keyed out her radio transmissions and told plaintiff she was "too emotional" when she complained about the sanitary napkin in the roll call room. On September 14, 1990, Madamba sent a memorandum to then-Inspector Rifice stating that plaintiff would often "tie in" sick days with her regular days off. As a result, on September 17, 1990, then-Chief of Police Robert L. McDuffie sent plaintiff a memorandum requiring her to produce a doctor's note every time she took sick leave.

When plaintiff complained to Madamba that the harassment by Charlie Platoon was becoming too much for her, he allegedly replied that female employees in the private sector were protected from such harassment because they "sleep with their bosses." When plaintiff then tried to change the topic of conversation and commented on Madamba's apparent weight loss, he stated that he lost weight by "having sex a few times a day," and that women came to him "when they're ready." (Tr. 2500.) Plaintiff interpreted this entire conversation as a solicitation by Madamba to have sex with plaintiff.

Plaintiff also alleges that co-workers harassed her while she was on Charlie Platoon. At the time, John Mooney was also a sergeant on Charlie Platoon. During their time working together, Mooney allegedly made derogatory comments to plaintiff including a remark that he had heard she "liked them hard and stiff," and that he did "real police work" unlike "those who push pencils and laid on their back." On one occasion, when plaintiff

was unable to locate her coffee mug, Mooney asked her if she wanted to drink out of his jock cup. Mooney also made a sexually implicit comment that she was "under the Captain's desk." Plaintiff further alleges that defendant Madamba was present when Mooney made many of these inappropriate comments but took no action against him.

Following unsuccessful efforts by plaintiff's husband Patrick Hurley (who is also an ACPD officer) to intervene on plaintiff's behalf, plaintiff submitted a memorandum to Madamba, on November 1, 1990, outlining the harassment to which she had been subjected during her tour on Charlie Platoon and requesting a transfer. Madamba forwarded Hurley's memo to the Chief of Police along with a memo of his own requesting that an internal affairs investigation be conducted. None ever was.

On November 8, 1990, plaintiff was transferred to the 8:00 a.m. to 4:00 p.m. shift, or Alpha Platoon, in the Property & Evidence Unit. Plaintiff had requested to stay on the midnight to 8:00 a.m. shift because she had adjusted her personal schedule to those hours. In addition, the Property & Evidence Unit is an isolated and undesirable assignment. She therefore alleges that this transfer was in retaliation for the claims of harassment in her memorandum of November 1, 1990. She further alleges that when she was transferred to the Property & Evidence Unit, she was denied a three-percent pay increase that ACPD officers routinely receive when transferred to plainclothes duty. On April 20, 1993, this increase was granted retroactively.

Plaintiff alleges that the harassment continued after she left Charlie Platoon. For instance, the graffiti apparently remained on the walls after plaintiff's transfer. Rifice, who had been promoted to Police Chief, testified that he heard complaints about the graffiti as late as March 1992, and Hurley's husband took photographs of the graffiti in the summer of 1992. An EEOC investigation concluded that "as recent as one week prior to June 23, 1993, sexual graffiti continued to be evident in [plaintiff's] work area." On June 13, 1992, while plaintiff was attending a police seminar, Mooney approached plaintiff and called her "the ass up from the Property Room" in front of two other sergeants.

The final incident of alleged discrimination against plaintiff came in the spring and summer of 1994, and involved a complaint from ACPD officer Kelly Lee Thomas alleging harassment by plaintiff. Plaintiff had allegedly pulled Thomas' hair because she was wearing it in a ponytail rather than up, as required by ACPD regulations. On May 22, 1994, defendant Mooney, then Captain of the Charlie Platoon, wrote a report suggesting that plaintiff receive counselling regarding this conduct. On July 8, 1994, plaintiff was counselled regarding this incident by Captain William McKnight. Captain McKnight told her about the harassment allegations by Officer Thomas and showed her Captain Mooney's report, but refused to give her a copy. Plaintiff alleges that the entire incident was in retaliation for her previous harassment claims.

Prior to October 18, 1991, the ACPD did not maintain a written sexual harassment policy. Before then, an officer who believed she was subject to sexual harassment could

report the matter to the ACPD Internal Affairs Unit, the ACPD Affirmative Action Officer, her direct supervisor, or the Chief of Police pursuant to his "open door policy." The officer could also file a grievance with the Police Benevolent Association.

Plaintiff worked continuously until July 26, 1994, after which she went on an extended paid sick leave. Plaintiff alleges that, as a result of the harassment, she has suffered severe emotional distress that has interfered with her work, her personal life, and her family life. Defendants have adduced testimony which suggests that Hurley faced emotional difficulties long before her assignment to Charlie Platoon in 1990, and that her current psychological difficulties stem from sources other than sexual harassment.

VI. DISCUSSION

A successful Title VII hostile work environment claim consists of five elements: (1) the plaintiff suffered intentional discrimination because of her membership in a protected class; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected plaintiff; (4) the discrimination would have detrimentally affected a reasonable person in plaintiff's position; and (5) the existence of respondeat superior liability. *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995) (citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990)). The conduct must be more than "merely offensive," but need not be so severe as to cause "a tangible psychological injury." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 20-22, 114 S. Ct. 367, 370, 126 L.Ed.2d 295 (1993).

To establish a *prima facie* case of retaliation under Title VII, plaintiff must show (1) that she engaged in protected activity, (2) that she was subjected to an adverse employment decision, and (3) that there was a causal relationship between the two. *Fuchilla v. Prockop*, 682 F. Supp. 247, 263 (D.N.J. 1987). Retaliatory harassment, rather than an adverse employment decision, may also form the basis for a retaliation claim. *Goldsmith v. E.I. Du Pont de Nemours & Co.*, 571 F. Supp. 235, 240 (D.Del. 1983); 2 L. Larson, *Employment Discrimination* § 34.04 at 34-57 to -62 (2d ed. 1995).

To state a claim for hostile work environment sexual harassment under the NJLAD, the plaintiff must show that the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 603, 626 A.2d 445 (1993)

To prove *quid pro quo* sexual harassment, a plaintiff must prove that a supervisor engaged in conduct that conditioned tangible job benefits on submission to unwelcome sexual conduct, or penalized her for refusing to participate in such conduct. *Model Jury Instructions: Employment Litigation*, § 1.04(2)(a), p. 38, (American Bar Association 1994) (and cases cited therein); Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions* § 1.04.09(A) (1987 & Supp.1995) (and cases cited therein).

A. *Sufficiency of Evidence as to Madamba*

Madamba argues that the evidence presented at trial was insufficient to impose liability against him individually. The jury apparently disagreed, and we decline to overturn their verdict because we find that it was based on substantial evidence.

The testimony at trial was adequate to support the jury's finding of liability against Madamba on both the hostile work environment claim and, albeit to a lesser extent, on the *quid pro quo* claim. Upon Hurley's assignment to Charlie Platoon, Madamba told Hurley that she, as a woman, had been sent there to "break my stones" (Tr. 2749)[7], and that he did not expect her to last long. Testimony indicated that Madamba frequently made comments that were derogatory to women generally. (Tr. 881, 907.) On at least one occasion, he referred to Hurley as a "dumb cunt." (Tr. 885.) When Hurley sought protection from him, her supervisor, against the harassment she believed she was experiencing, Madamba told her that women frequently sleep with their bosses in order to gain such protection. (Tr. 2499.) The jury could view this remark as conditioning the tangible job benefit of being free from harassment on having sex with Madamba.

Madamba completely ignored the graffiti that was found not only in the bathroom but even in the roll call room. (Tr. 2489.) Once, after a new drawing had appeared in a restroom, Madamba rushed in to see the picture, saying that "I have got to see this." He emerged from the

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[7] The word "stones" was sometimes "balls" in the testimony.

bathroom and proclaimed laughingly to Hurley and several others, "it's a really bad one." (Tr. 2509.)[8]

In addition, Madamba asked plaintiff to submit a transfer request so she could be with her children. (Tr. 2481.) He suggested that women make bad police officers and ineffective supervisors, and always require backup. (Tr. 907, 2554-2555, 2810.)

Testimony further indicated that Madamba undermined plaintiff in other ways that the jury could reasonably have concluded were related to plaintiff's sex, although they are not self-evidently so. *See, Lehmann*, 132 N.J. at 605, 626 A.2d 445 ("not all sexual harassment is sex-based on its face"). For example, testimony indicated that Madamba denied Hurley's vacation requests (Tr. 189), gave her undesirable assignments (Tr. 117, 174), undercut her authority by treating her disparagingly, orally abused her at roll call, excluded her from important meetings, and attempted to transfer her. Such testimony, especially when considered in the aggregate, clearly provided evidence sufficient to support the jury's finding Madamba liable for damages.

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[8] Although it has not been established under New Jersey law whether inaction can give rise to liability, *see infra*, Part D-3, and we set forth a higher standard that required affirmative conduct in our charge, the jury could certainly have found that Madamba's failure to act in spite of his knowledge that Hurley was being abused provided insights into his mental state, motives, and discriminatory intent. Madamba's inaction might in this manner have assisted the jury in interpreting his affirmative conduct.

B. *Dr. Hoyme's "Surprise" Testimony*

Madamba argues that the reference by plaintiff's psychological expert, Dr. Hoyme, to a "second diagnosis" regarding a "psychological assault" on Donna Hurley constituted unfair surprise because the testimony was materially different from that offered previously and provided the defendants with no opportunity to counter. This issue is a red herring. It is a product primarily of discovery-based bickering between the lawyers, and secondarily of the institutional differences between lawyers, who demand unvarying precision, and psychiatrists, who confront the complex, variable, and ambiguous realm of human feeling. It has no bearing on the merits of this case and does not even come close to undermining the jury's verdict.

An early report by plaintiff's expert, Dr. Hoyme, was dated November 16, 1994. Defendants' psychological expert, Dr. Toborowsky, responded to Dr. Hoyme's expert report. By way of rebuttal, Dr. Hoyme issued another report on February 20, 1995. On March 2, 1995, Magistrate Judge Kugler ordered that Dr. Hoyme's February 20, 1995, report be barred as out of time. The magistrate judge's decision was appealed to this Court at the summary judgment stage. We upheld the magistrate judge's determination but ruled that we would allow plaintiff to renew the motion at trial, at which time we felt we would have a better sense of the significance of the testimony. Plaintiff therefore renewed the motion at trial. Because we were concerned that the magistrate judge's sanctions against the plaintiff cut too close to the essential truth-

seeking function of the Court, we overruled the magistrate judge's decision to bar Dr. Hoyme's report of February 20, 1995. (Tr. 1706.)

A new trial may be granted only if the expert's courtroom testimony varied from his deposition testimony "in such a way as to surprise the [defendant] with unannounced, material changes," *Spurlock v. Lawson*, 881 Supp. 436 (E.D. Ark. 1995), which in turn lead to prejudicial surprise "inconsistent with substantial justice." *Conway v. Chemical Leaman Tank Lines, Inc.*, 687 F.2d 108, 111-12 (5th Cir. 1982). The circumstances surrounding Dr. Hoyme's testimony, although regrettable and unfortunate, do not even approach this standard.

Defendants' primary complaint is that Dr. Hoyme introduced at trial a novel "second diagnosis" in which he stated that Hurley suffered emotional harm, but not a traditional psychiatric disorder, as a result of the "psychological assault" she suffered in the workplace. (Tr. 1667). He testified that the defendants' conduct constituted an "aggressive attack on her" and a kind of "sexual assault" which caused "severe pain" comparable to "physical touching." (Tr. 1726-29.) Plaintiff's lawyer revisited this theme at closing.

We hold that Dr. Hoyme's testimony did not create prejudicial surprise, and that this case does not meet the standard for a new trial, for four reasons. First, notwithstanding Dr. Hoyme's report of February 20, 1995, his earlier report, dated November 16, 1994, hinted strongly at this "second diagnosis" when he wrote that, "[m]y diagnosis is Adjustment Disorder with mixed features of anxiety and depressed mood (309.28 DSM IV). . . . This

diagnosis carries an implied causal connection between their traumatic experiences (sexual harassment, hostile work environment, and subsequent harassment) and their symptoms." This statement, though terse, plainly expresses Dr. Hoyme's belief that Hurley's suffering was partly caused by the trauma of workplace harassment.

Second, the defendants actually received the report of February 20, 1995, which clarified the issue, and were unquestionably aware of the appealability of the magistrate's order. Third, defendant Madamba, the party presently raising the issue, actually cross-examined Hoyme on this very topic in a deposition on March 3, 1995. By this time Madamba had already received Hoyme's report of February 20, 1995. At the deposition, plaintiff's attorney, Benjamin Folkman, informed Madamba's attorney, Mark Falk, that plaintiff intended to appeal the magistrate's decision to this Court. (Dep. at 78.) Falk responded that he would, therefore, question Dr. Hoyme concerning the barred report, and proceeded to attempt do so. (Dep. at 79.)

Fourth, the "surprise" testimony, such as it was, took place on December 7, 1995. Defendants' expert, Dr. Toborowsky, did not testify until January 24, 1996. (Tr. 4542.) Defendants thus had several weeks in which to prepare rebuttal testimony and, indeed, Dr. Toborowsky indicated on the stand that he had previously read both the deposition and courtroom testimony of Dr. Hoyme. (Tr. 4557.)[9] Under these circumstances there was no surprise.

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[9] The court reporters (in an admirable performance) produced trial transcript daily throughout the trial.

Dr. Hoyme's testimony as to "psychological assault" was a relatively insignificant component of the case. Although Madamba suggests that it was "inflammatory," this jury was presented with evidence that was considerably more inflammatory than Dr. Hoyme's mild-mannered testimony. Certainly the good Doctor's "second diagnosis" was less inflammatory than the drawings and other materials which were introduced into evidence as the actual weapons of the psychological assault. Dr. Hoyme's telling the jury that Hurley was psychologically assaulted by these materials did not provide them with anything they could not already see for themselves.[10]

C. *Evidence Not Obviously Linked to Donna Hurley*

Defendants Madamba and ACPD contend that the Court erred in admitting into evidence: (1) sexual harassment directed at other women; (2) derogatory remarks

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[10] Defendants' reliance on *Spurlock v. Lawson*, 881 F. Supp. 436 (E.D. Ark. 1995), is misplaced. That case was a medical malpractice action in which a mother sued several doctors who operated on her and thereby, she contended, triggered the premature birth of a child who subsequently obtained cerebral palsy. At trial, defendant's expert introduced a theory of the cause of the disease that he had never addressed before. He testified that an adult may have shaken the baby so badly that her brain was damaged. In addition to the crucial distinction, addressed above, that there was simply no element of surprise in the case at bar, the *Spurlock* testimony was also incomparably more incendiary than Dr. Hoyme's "second diagnosis." The *Spurlock* defendant tried to turn the case entirely on its head by putting the mother on trial. The district judge was clearly appalled. Dr. Hoyme, by contrast, offered evidence that expanded only slightly on themes previously set forth in his expert reports and deposition testimony.

about women made by men outside the presence of women; and (3) incidents that occurred prior to the period to which liability may attach under the statute of limitations. Because we chose to admit all of this evidence for similar reasons – primarily our firm belief that it was crucial to the jury's evaluation of the work environment at the ACPD – we will address the different forms of evidence together.

The Court permitted eight police officers to testify at trial regarding the extent and pervasiveness of hostility towards women in the ACPD. These officers testified that officers and patrolmen commonly referred to women as "cunts," "broads," "bitches," "douche bags" and, as a group, "the crack troop." At least one officer testified that inspectors and captains routinely referred to plaintiff as "the wacky cunt." (Tr. 413, 602, 1039, 1145, 442.)

The Court also permitted four women who had been associated with the ACPD to testify regarding the harassment of women within the department. Deborah Rando, a police officer, testified that Sergeant John Mooney made several harassing and offensive comments to her, including referring to her as "no ass Rando." (Tr. 931.) Rando testified that on one occasion, Mooney told her he would like to rub mayonnaise between her legs so it would look as if a man had ejaculated on her. (Tr. 934.)

Martha Donovan, a municipal prosecutor for the City of Atlantic City, testified that Sergeant Edward Yard of the ACPD called her a "cunt" in front of 50 other people during a confrontation. (Tr. 831.) Finally, two payroll employees, Julia Cardy (Tr. 1166) and Lisa O'Keefe (Tr. 859), testified regarding incidents of harassment and

retaliation by Sergeant Griggs and Captain McDonald of the ACPD.

Madamba and the ACPD argue that this testimony should not have been admitted because the incidents occurred outside of plaintiff's awareness, and were therefore irrelevant to the jury's evaluation of Donna Hurley's work environment.

Defendants also argue that the Court should not have permitted testimony about locker-room conversation between men in the absence of women. The ACPD points in particular to Captain Robert Flipping's testimony that men referred to women as "cunts" and "crack troops." (Tr. 404.) Similarly, Officer Munoz testified that women were referred to as "cunts, douche bags, things like that" outside their hearing. (Tr. 768.) Former officer William Hurley (Tr. 1064) and plaintiff's husband, Officer Patrick Hurley (Tr. 1377), offered similar testimony.

Defendants contend as well that evidence of discrimination that took place prior to the beginning of the time period framed by the statute of limitations was improperly presented in this case. The time period for which liability attached in this case ran from January 20, 1987, through January 20, 1993. We allowed testimony concerning several incidents that occurred prior to January 20, 1987, and in particular from the time period of 1978 to 1981. Testimony that plaintiff's supervisor, Sergeant Reay, made sexually offensive remarks in 1981 was admitted into evidence. (Tr. 1213.) We admitted testimony that a tampon (Tr. 1338, 2390) and a copy of *Hustler* magazine (Tr. 2389) were placed in plaintiff's squad car. We also

admitted testimony that Hurley was referred to as "the cunt" as far back as 1981. (Tr. 2388.)

Defendants argue that all of this evidence placed them in an impossible position in that they were unable to rebut the testimony because of its age and vagueness. We recognize that the distinction between evidence offered for the purpose of determining liability and evidence offered for its utility in helping the jury to understand the evidence offered for liability is not a simple one. It is not, however, any more complex than other legal issues juries routinely face, or than this jury faced, for example, with respect to the ACPD's liability for the acts of its employees.

Evidence of harassment of other women and of events prior to 1987 place plaintiff's experience at the ACPD in context. It permits the jury to better understand the events that took place from January 20, 1987, through January 20, 1993. And although we permitted the jury to hear a complete version of plaintiff's experience at the ACPD, we specifically instructed them that, "[y]ou are to consider whether each defendant has engaged in sexual discrimination for the period from January 20, 1987, through January 20, 1993. You may consider evidence from before and after these dates to help you evaluate the defendants' conduct from January 20, 1987, through January 20, 1993, but liability attaches, if at all, only to defendants' conduct during this period." (Jury Charge, § 14.)

The heart of this case was the hostile work environment claim. It is a claim that is very hard for a jury to evaluate and even harder for a plaintiff to prove. It may depend a great deal, for example, on such things as

nuance, motives, gestures, the way things are said, and workplace customs.

Permitting evidence of other women's experiences at the ACPD, of the attitudes of male officers towards women generally, and of Hurley's experiences prior to 1987 served several important purposes in this trial. It allowed the jury to gain insight into the motives, attitudes, and intentions of the defendants. It gave them the opportunity to evaluate the adequacy of management's response to Hurley's complaints during the statutory period. It provided the jury with a sense of whether the events that took place during the statutory period were anomalous or accidental, or instead were part of a "pervasive and severe" pattern.

Plaintiff's treatment during the statutory period was unquestionably influenced by and related to her treatment throughout the course of her career at the ACPD. Plaintiff's experience was reflective of the general attitudes of the men around her; those attitudes also influenced, and were revealed in, the treatment of other women in the ACPD.

In a case involving racial discrimination, the Third Circuit held that evidence that anonymous note-writers had referred to plaintiff as a "nigger" was evidential: "the court may also consider as circumstantial evidence the atmosphere in which the company made its employment decisions. One could infer from employees' remarks and the racially derogatory notes [plaintiff] received that management permitted an atmosphere of racial prejudice to infect the workplace." *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632 (3d Cir. 1993). Similarly, in *Morgan v.*

Hertz Corp, 542 F. Supp. 123 (W.D. Tenn. 1981), the court admitted evidence of a "history of vulgar and indecent language tolerated by management and directed toward women employees." The court held that such evidence was probative of workplace hostility.

All of this evidence, while not forming a basis for liability, permitted the jury to more intelligently evaluate the evidence that did create liability. Barring the evidence would have provided the jury with an incomplete, fragmented picture of the ACPD and plaintiff's life there. It would be like expecting someone to understand a movie, but letting her watch only the final twenty minutes, and letting her hear only the dialogue between the two most significant characters. *See Andrews*, 895 F.2d at 1484 (analogizing to a play and holding that a hostile work environment analysis must concentrate on the "overall scenario" created by seemingly isolated and ambiguous incidents).

By admitting the evidence but forbidding the jury to consider it as directly relating to liability, we were able to balance the interests of the plaintiff and the defendants. The jury was better able to understand and evaluate the events that transpired between January 20, 1987, and January 20, 1993, without the defendants being unfairly prejudiced.

The testimony of other harassment victims tends to prove that plaintiff's experience was not isolated. It suggests that Hurley's experience was not unique and her reaction not unwarranted. It also helps the jury to evaluate the likelihood that the ACPD knew what was taking

place. The New Jersey Supreme Court has held that evidence of "harassment directed at other women was relevant to both the character of the work environment and its effects on the plaintiff." *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 611, 626 A.2d 445 (1993). The court also stated that, "the plaintiff may use evidence that other women in the work place were sexually harassed. The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others." *Id.*

We agree as well with the court in *Garvey v. Dickinson College*, 763 F. Supp. 799 (M.D. Pa. 1991), that such evidence is admissible, among other bases, under Fed.R.Evid. 404 to prove that a defendant harbors "discriminatory intent" towards a particular group. *See, West v. Philadelphia Elec. Co.*, 45 F.3d 744, 757 (3d Cir. 1995) ("evidence of harassment of others will support a finding of discriminatory intent with regard to a later incident"). We do not find that these incidents were too remote from the plaintiff and her work environment to be relevant, and we firmly believe that they helped to shed light on plaintiff's hostile work environment claims.[11]

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[11] The admission of evidence of sexual harassment directed towards women other than the plaintiff is in fact very well supported in the case law. In addition to its holding in *West*, 45 F.3d at 757, the Third Circuit Court of Appeals has endorsed in dicta the idea that female employees other than the plaintiff should be permitted to testify in *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 195 (3d Cir. 1994). In that case, plaintiff Glass appealed from a jury verdict denying his claim for race and age discrimination. Glass argued that the district court had abused its discretion when it excluded evidence concerning the racial hostility of his work environment, and yet admitted evidence

Under Fed.R.Evid. 403, "evidence may be excluded if its probative value is substantially outweighed by the

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introduced by the employer showing that Glass had received poor evaluations. Glass had attempted to introduce evidence that would have shown that more senior employees posted hostile and demeaning images about him and that he was the subject of racially derogatory remarks.

The present case, of course, involves the admissibility of evidence of harassment directed not towards the plaintiff, but rather towards other women from her workplace. Nonetheless, the *Glass* court cited with approval cases that have held that evidence of discrimination against other members of the plaintiff's protected class is admissible in deciding a hostile work environment claim. *Id.* at 195, citing *Hawkins v. Hennepin Technical Center,* 900 F.2d 153, 155 (8th Cir. 1990) (holding that the district court abused its discretion in barring plaintiff from introducing evidence of sexual harassment of other employees in an action alleging unfair employment decisions based on sex), and *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986) (affirming district court's decision to admit plaintiff's evidence of harassment against other black workers in case alleging racially discriminatory discharge because "evidence was relevant both in showing that Allis Chalmers condoned racial harassment by its workers and in rebutting Allis Chalmers' defense that it had fired Hunter for cause.")

Although the *Glass* decision arose in a factual setting somewhat different from the case at bar, district Judge Huyett of the Eastern District of Pennsylvania faced a similar situation. The Pennsylvania case involved a Title VII claim alleging sexual harassment and discrimination. In admitting testimony by other women, Judge Huyett wrote that, "to determine whether a plaintiff has proven a claim for sexual harassment based upon an intimidating, hostile, or offensive work environment, a court must examine the totality of the circumstances. Included in the totality of the circumstances is evidence of sexual harassment directed at employees other than the plaintiff, which is relevant to show a hostile work environment." *Stair v. Lehigh Valley*

danger of unfair prejudice." In this case, although the defendants were prejudiced by the admission of the

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Carpenters Local Union No. 600, 813 F. Supp. 1116, 1119 (E.D. Pa. 1993).

Other cases have held with compelling consistency that testimony by other members of the plaintiff's protected class regarding the work environment is relevant and admissible. In *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), a black female security guard brought an action under Title VII for racial and sexual harassment. The appellate court reversed the decision of the trial judge to exclude testimony that a number of the plaintiff's female coworkers had also been sexually harassed by plaintiff's supervisor. The appellate court reasoned that, "[e]vidence of a general work atmosphere therefore – as well as evidence of specific hostility directed toward the plaintiff – is an important factor in evaluating the claim." *Id.* at 1415.

In *Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995), the court reached a similar conclusion. The plaintiff, a waitress, brought a Title VII claim for quid pro quo sexual harassment in which she claimed she had been fired for refusing her employer's sexual advances. The district court granted the employer's motion in limine to bar testimony regarding the employer's alleged harassment of other female employees, reasoning that such testimony, while relevant to a hostile work environment claim, was more prejudicial than probative of a quid pro quo sexual harassment claim. *Id.* at 1477. In reversing, the Circuit court held that, "[t]he sexual harassment of others . . . is relevant and probative of [the defendant's] general attitude of disrespect toward his female employees, and his sexual objectification of them." *Id.* at 1480. This logic, which was applied in *Heyne* to a quid pro quo sexual harassment claim, is even more compelling in a hostile work environment suit (such as Hurley's), as the *Heyne* district judge noted.

Numerous other courts have concluded that testimony by other members of the plaintiff's protected class is admissible. *See, e.g., Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd in part and rev'd in part sub nom, Meritor Svg. Bank v. Vinson*, 477

disputed evidence, the prejudice was not unfair and did not substantially outweigh the probative value. Moreover, any possibility of unfair prejudice was corrected by the jury charge.

Perhaps more important, the contested evidence was simply not very prejudicial in the context of this case. In a different case, evidence that men spoke ill of women behind their backs, or that other women in the workplace were mistreated, or that the plaintiff was called a nasty name fifteen years ago might be viewed as sufficiently prejudicial to lend substance to a motion for a new trial. But in this case the prejudice was insignificant. This is a case where the plaintiff was compelled to attend roll call in front of a life-size drawing of herself performing oral sex as her supervisor, Madamba, sat eight feet away (Tr. 2488); where, in addition to pervasive graffiti directed at plaintiff, a sanitary napkin bearing sergeant's stripes dangled over the podium from which she spoke (Tr. 2761), and a dildo was affixed to a wall or ceiling nearby (Tr. 430, 1037); and where plaintiff's professionalism and performance were constantly undermined because the men on the force could not tolerate a woman among them. It is a case where the plaintiff's supervisor responded to plaintiff's entreaties by insinuating that he might be able to help her if only she would sleep with him. Amid such

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U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986); *Hall v. Gus Const. Co., Inc.*, 842 F.2d 1010, 1015 (8th Cir. 1988); *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983); *Webb v. Hyman*, 861 F. Supp. 1094, 1111 (D.D.C. 1994); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

evidence, the testimony the defendants now contest can hardly be viewed as unfairly prejudicial.

Finally, defendant ACPD argues that the inclusion of this supposedly extraneous evidence was unfair because the Court's prior rulings were misleading. In particular, the ACPD points to pages 5 and 16 of our slip opinion of August 4, 1995. *Hurley v. Atlantic City Police Department*, 1995 WL 854478 at *2, *6 (D.N.J. 1995) (Irenas, J.). On both pages we made reference to our belief that plaintiff's claim centers on the events of 1990. We still believe that the most shocking examples of harassment took place on Charlie Platoon in 1990. Indeed, it is partly because the events of that time were so egregious that we do not believe the admission of earlier evidence carried any unfair prejudice in the trial.

Our statements in the opinion were not, however, intended as an indication that the events of 1990 were all that would be admitted into evidence. Nor can our opinion reasonably be read to suggest as much. As the trial progressed the Court quite naturally gained a better understanding of the case. We determined that the challenged testimony was important to helping the jury understand the events of 1990. For the defendants to have assumed, based on general background statements in our summary judgment opinion, that we were making a final decision as to admissibility at trial is truly an example of hearing what one wants to hear. The defendants had ample notice of this evidence from at least the time they deposed plaintiff. They had ample opportunity to cross-examine and to present counter-testimony from their own witnesses. There was no unfairness and no surprise.

D. *The Jury Charge*

1. *Hostile Work Environment Charge (Jury Charge § 14(b))*

Defendants Madamba and the ACPD argue that the jury charge was inaccurate and misleading for a number of reasons.[12] To begin with, both defendants attack the structure and content of the hostile work environment charge set forth in § 14(b). Defendants argue that the charge strayed from the *Lehmann* standard by mixing Title VII law with NJLAD law. They also argue that we failed to instruct the jury as to precisely how each of the ten listed factors bore on the issue of sexual harassment. Although both accusations are partly true, those decisions were deliberately made and neither was error.

The New Jersey courts have consistently recognized the influence of Title VII law in interpreting the NJLAD. The *Lehmann* court stated specifically that "in interpreting the LAD, New Jersey Courts have, and should continue to, use Title VII law as an interpretive tool." 626 A.2d at

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[12] We note for the purpose of clarity that the ACPD has submitted two different versions of that portion of its brief which addressed the jury charge, because the jury charge the ACPD initially attacked was a draft charge. We address only the ACPD's revised submission. The charge went through several drafts, many of which were submitted to the parties for comment. Indeed, the charge attached as Exhibit A to the ACPD's revised brief also is not the final charge, though it is identical to the final charge except for some very minor adaptations. For the benefit of the parties and the appellate courts, the three separate charges given to the jury are marked in the clerk's file as Exhibits C-6a, C-12 and C-14.

452. The *Lehmann* court itself recognized that sexual discrimination is a "constantly evolving field."

Informed in part by Title VII law, we chose to craft the hostile work environment charge in such a way as to deal with the specific elements of this case. The decision to import Title VII law was deliberate, not only because the ACPD faced Title VII liability,[13] but also because the New Jersey Supreme Court has itself frequently imported Title VII concepts into the NJLAD. We were constantly aware, however, that Madamba and Rifice faced only NJLAD liability. Rather than present two separate, but extremely similar, charges under the NJLAD and Title VII, we chose to merge the two into one charge that accurately expressed both Title VII and NJLAD law.[14] There was no misstatement as to either Madamba or the ACPD. Certainly there was no prejudice. By combining the different areas of law, we were able to present a single, comprehensible, and cogent presentation of the

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[13] *Hurley v. Atlantic City Police Department*, 1995 WL 854478 at * 7, *17 (D.N.J. 1995) (Irenas, J.) (also see decretal paragraph 2 of the Order entered in conjunction with the opinion).

[14] In fact, the Court's charge conflated not only the NJLAD and Title VII claims, but also plaintiff's complaint under 42 U.S.C. § 1983, which requires a higher standard than the other two and thus added nothing to plaintiff's case, at least not for the purposes of the jury charge. We explained to the parties, on the record, that we did not see enough substantive differences between these laws, as applied to this case, to warrant giving different but substantially similar charges. We presented all counsel with opportunities to submit briefs and proposed charges, and to comment on our charge. At no point did counsel alter our conviction that distinct charges were unwarranted and potentially confusing to the jury.

law of hostile work environment as it relates to the facts of this case.

The root of the hostile work environment charge was a combination of the *Lehmann* instruction and of the hostile work environment charge presented in ABA Model Charges § 1.04(2)(b), p. 40. The resulting draft was subsequently modified by our analysis of the case law and by the submissions and arguments of the parties.

The four-prong *Lehmann* analysis is set forth verbatim on page 15 of the charge. On page 16, we instructed the jury that it "should consider the following factors," and then listed ten of them. These were elements that were present in the case and which we felt the jury could properly evaluate under the law. The relevance of each of these ten factors to a hostile work environment claim is well-rooted in reason, common sense, and the case law.

In the body of the hostile work environment charge, we elaborated on those elements which were crucial to the jury's determination of liability, such as points (4), (5), (7), (9), and (10). The other factors we merely directed the jury to weigh as being properly considered in evaluating hostile work environment liability. The jury was instructed to "consider" the ten factors in helping them to decide whether the requisite elements of liability – which were set forth in plain language immediately above and below the "ten factors" – had been established.

The only "factor" to which any defendant has objected specifically is factor (1), "plaintiff's reasonable expectation upon entering the workplace," which the ACPD argues is "completely irrelevant" to the issue of liability. This factor had little bearing on the facts of this case or

the outcome of the trial. Hurley's expectations were not much in evidence, and we do not think this "factor" played a significant role in this case or the jury's deliberations. Moreover, the factor helps the ACPD more than it hurts them: the jury could reasonably read it as suggesting that Hurley should have realized the ACPD was a rough, macho, sexist place when she joined. Although we do not necessarily advocate such reasoning, it appears to be at the legal roots of the factor. *See, e.g., Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984) after noting this factor the court wrote that, "in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to – or can – change this." *See also Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986).

Factor (1) is properly considered under the law. Certainly it relates to the "reasonable woman" standard, which no one disputes is applicable to this case. In addition, it is a factor that has been explicitly cited in several Title VII cases. *See, e.g., Rodgers v. Western-Southern Life Ins. Co*, 12 F.3d 668, 674 (7th Cir. 1993); *Daniels v. Essex Group*, 937 F.2d 1264, 1274 (7th Cir. 1991); *Rabidue*, 805 F.2d at 620; *Brooms v. Regal Tube*, 881 F.2d 412, 418 (7th Cir. 1989).[15] The ACPD faced Title VII liability, of course,

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[15] We are aware that these last two cases have been criticized to some extent by *Lehmann*, 132 N.J. at 607, 626 A.2d 445, and *Harris v. Forklift Systems*, 510 U.S. 17, 20-22, 114 S. Ct. 367, 370, 126 L.Ed.2d 295 (1993). However, that criticism related only to their holding that a plaintiff is required to prove serious psychological harm. It was not related to the more limited principle for which we cite the cases herein.

and we do not believe that it was inappropriate for the jury to have considered factor (1) under the NJLAD.

Madamba argues that our instruction, in factor (10), that the jury should consider "whether the complained of conduct was directed at men and women alike" was erroneous because we should have instructed the jury that "the law compels them to find that *no* hostile work environment exists if the complained-of conduct was directed at men and women alike."

We did. In section 14(b) of the jury charge, on page 15, the jury was instructed that "to establish a claim of hostile work environment sexual harassment, plaintiff must prove by a preponderance of the evidence that the conduct about which she complains: (i) would not have occurred but for the employee's gender. . . . " We further emphasized the point on the next page: "It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees of both sexes. In order to find hostile work environment sexual harassment, you must find that plaintiff was harassed because she is a woman. The harassing conduct may, but need not, be sexual in nature; rather, its defining characteristic is that the harassment occurs because of the victim's sex." Again, the jury was to consider the ten factors in light of the elements of liability set forth in the surrounding text. The requirement that the complained-of conduct be a direct result of the plaintiff's gender, and not something that took place irrespective of gender, was perfectly plain.[16]

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[16] We note as well that Madamba's argument has no support in the evidence. The harassment that took place in this

Madamba further argues that we "gave undue weight and extended discussion to the 'reasonable woman' standard and bare mention of the requirement that the conduct must be gender-based" and that we should have discussed each element "with equal force." Madamba Brf. at 48. Madamba is correct that we explained the "reasonable woman" standard at greater length than the requirement that the conduct must be gender-based. The "reasonable woman" standard is significantly more complicated than the requirement that the conduct must be gender-based, and more removed from a lay person's understanding and experience. It demanded more explanation. Both were explained adequately, and we are aware of no requirement that the many different ideas expressed in a jury charge must be set forth in the same number of words.

2. *Structure of the Discrimination Charge (§ 14)*

Madamba argues that it was error for the jury charge to present four separate bases of liability – intentional sexual discrimination, hostile work environment, *quid pro quo*, and retaliation – by which to judge "precisely the same enigmatic conduct." Madamba Brf. at 47. He asserts that this structure gave the jury and the plaintiff "four bites of the apple" and that it "implied that defendant's

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case was in most instances blatantly sexual in nature and obviously occurred because Donna Hurley was a woman. It is rather hard to argue that harassment is not sex-based when it involves dildos, sanitary napkins, misogynistic language, a sexual proposition, disparaging comments about women police officers, and targeted, sexually graphic graffiti.

conduct was wrong and it was just a question of what category it fell into." *Id.* This argument is meritless.

There is a good deal of overlap conceptually among these four categories, and the same conduct can support liability under more than one of the theories. For example, Madamba's alleged sexual solicitation of Donna Hurley, if true, could easily fall under both hostile work environment and *quid pro quo* discrimination on the basis of sex. Although the heart of plaintiff's claim was unquestionably hostile work environment, we believe there was sufficient evidence presented at trial to warrant instructing the jury on each of the four theories. A finding that a defendant had engaged in any one of them was sufficient to create liability. We simply presented the different legal theories to the jury so that it could apply the law to the facts introduced in evidence. Nowhere did we imply that any defendant was implicated under any theory. Indeed, section 15 of the charge, which immediately followed the sexual discrimination charge, was devoted entirely to addressing the concerns expressed in Madamba's brief.

3. *Individual Liability (§ 17)*

Madamba also criticizes the Court's individual liability charge set forth in section 17. In response to a question from the jury, the Court presented an "Amended Version" of section 17 which defined the terms "aid" and "abet" and which was provided to the jury for their perusal during deliberations. The scope of individual liability under the NJLAD has not yet been clearly established. No New Jersey court has resolved the issue.

In *Tyson v. CIGNA*, 918 F. Supp. 836 (D.N.J. 1996) (Irenas, J.), this Court expanded on its view of personal liability under the NJLAD. We will not resurvey the legal territory here, but instead refer the reader to *Tyson* for a detailed presentation of our understanding of individual liability under the NJLAD. Briefly, we held in *Tyson* that the NJLAD "imposes liability on supervisory employees only to the extent that the supervisory employee affirmatively engages in discriminatory conduct while acting in the scope of employment. A supervisory employee's omissions, acquiescence, passivity or other failure to act will not support a claim under the NJLAD." *Id.* at 837.[17]

Madamba's primary concern with section 17 is the "aid and abet" language, which he believes may have led the jury to impose liability wrongfully as a result of his failure to respond to harassment by other men in Charlie Platoon. We note, first, that the charge stated explicitly that "individual defendants may be held liable only for their individual, affirmative wrongful acts." Madamba believes that we should have stopped right there, and cites in support *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990). The addition of "aid and abet" at the end of section 17 is not inconsistent with our prior directive that "affirmative conduct" is required. When the two are read in conjunction, as they must be, the charge states

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[17] Although we did not charge the jury concerning scope of employment in section 17 (we did address it in section 16(a)), we do not believe, and Madamba does not argue, that this was error. The conduct for which the jury found Madamba to be liable – and, indeed, probably all of the evidence of harassment in this case – clearly took place within the scope of employment as that phrase is defined in *Lehmann* and *Tyson*.

that a supervisor may be held liable for affirmative, wrongful conduct which aids or abets another's discriminatory conduct. This is, in our view an accurate statement of the law.[18]

New Jersey law on the subject of individual liability under the NJLAD is unsettled. At the time the charge was given, the Third Circuit had not yet issued its opinion in *Sheridan v. E.I. duPont de Nemours & Co.*, 1996 WL 36283 at *13 (3d Cir. 1996), rehearing en banc granted, judgment vacated, 74 F.3d 1459 (Feb. 28, 1996), which held that there is no individual liability under Title VII but which has since been withdrawn.[19] To this day, the New Jersey courts have not addressed the topic. If and when they do, they may well, in spite of *Tyson*, attach literal weight to N.J.S.A. 10:5-12(e). We do not pretend to have made the

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[18] Even *Andrews* does not support Madamba's argument. At the very page Madamba cites, the court held that supervisory liability can be based on "actual knowledge and acquiescence" and imposed liability on two supervisors in part because they were "aware of the problems concerning foul language and pornographic pictures but did nothing to stop them." 895 F.2d at 1478-1479. To the extent there may be a grey area in defining precisely what supervisory behavior will rise to the level of "affirmative conduct," we explicitly declined to define its boundaries in *Tyson*, noting only that "generally speaking, the conduct must clearly evince the supervisor's subjective intent to engage in discriminatory conduct." 918 F. Supp. at 841 n. 8. By emphasizing that an individual defendant must "wilfully and knowingly associate himself in some way with the unlawful act," we think the *Hurley* charge also made it clear that a subjective intent to discriminate was required.

[19] Although the *Sheridan* opinion has been withdrawn, we would hazard to guess that its holding relating to individual liability under Title VII will not change upon rehearing.

final proclamation on the issue. Reasonable minds can and do differ as to the meaning of N.J.S.A. 10:5-12(e) and the degree of action or inaction required on the part of a supervisory employee in order to establish personal liability. In light of the uncertainty in this field, we do not believe that our charge, which presented N.J.S.A. 10:5-12(e) virtually verbatim, can be viewed as error.

This is even more true when one moves beyond abstract legal theory to consider the evidence presented in this case. Substantial evidence indicated that Madamba personally participated in affirmative sexual harassment by using foul and abusive language towards plaintiff, misusing his position for sexual solicitation, and acting in seemingly neutral ways (e.g., unfavorable assignments, vacation denials, etc.) that had a negative effect on Hurley and which the jury could reasonably have found were based on her sex.

To the extent that Madamba believes he may have been tarnished by his apparent inaction (e.g., with respect to the suspended sanitary napkin and the graffiti), we believe that the original charge was perfectly clear in requiring "individual, affirmative wrongful acts" and in stating that "inaction or delay in responding to the conduct of others" will not create liability.

This point was made even more forcefully by the amended charge we presented to the jury in response to their question regarding the meaning of "aid and abet." The amended charge was influenced by *Baliko v. Stecker*, 275 N.J. Super. 182, 645 A.2d 1218, 1223 (App. Div. 1994) (using criminal law definition of "aid and abet" in a NJLAD sexual harassment case). Section 17 (amended

version) states clearly that a willful act is required: "In order to aid or abet another to commit an unlawful act, it is necessary that the defendant willfully and knowingly associate himself in some way with the unlawful act, and that he willfully and knowingly seek by some act to help make the unlawful act succeed." The amended charge thus comports with our holding in *Tyson*, which merely set forth the legal standard in a more thorough and scholarly manner. The original charge and the amended version make it perfectly clear that Madamba may not be held liable unless he intentionally involved himself in unlawful, sexually harassing conduct. We see no error.

Finally, the jury's decision to exonerate Rifice suggests that the jury grasped section 17 perfectly. Unlike Madamba, Rifice was implicated in this case almost solely because of his failure to act to help Hurley despite his awareness of her plight. If, as Madamba asserts, the jury found liability against Madamba because of his inaction – which would be in contradiction to our charge in both its original and amended versions – the jury would also presumably have found Rifice liable for his failure to act. That it did not do so indicates the jury's understanding that inaction does not create liability, and its compliance with and understanding of our charge.

4. *The ACPD's Liability for the Acts of its Non-Supervisory Employees (§ 16(b))*

The ACPD argues that "*Lehman* [Lehmann] absolves an employer of liability when it takes reasonable steps to address the alleged sexual harassment," and that we should have so charged the jury. In support of this legal

argument, the ACPD cites, not *Lehmann*, but a Title VII case, *Bouton v. BMW of North America*, 29 F.3d 103, 110 (3d Cir. 1994) ("we hold that an effective grievance procedure – one that is known to the victim and that timely stops the harassment – shields the employer from Title VII liability for a hostile environment").

There is no question that Title VII has had a powerful influence on the NJLAD. With respect to employer liability, however, the New Jersey courts have explicitly rejected the *Bouton* "shield." The ACPD is simply wrong: *Lehmann* does not automatically protect an employer against liability when it takes reasonable steps to address sexual harassment. Under *Lehmann*,

> In light of the known prevalence of sexual harassment, a plaintiff may show that an employer was negligent by its failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms. We do not hold that the absence of such mechanisms automatically constitutes negligence, *nor that the presence of such mechanisms demonstrates the absence of negligence.* However, the existence of effective preventative mechanisms provides *some evidence of due care* on the part of the employer. . . . Similarly, given the foreseeability that sexual harassment may occur, the absence of effective preventative mechanisms will present strong evidence of an employer's negligence.

132 N.J. at 621, 626 A.2d 445 (emphasis added). As the above quotation indicates, the effect of anti-harassment

policies on employer liability under the NJLAD is considerably more complicated than the simplistic "shield" of *Bouton*. "[T]he presence of such mechanisms [does not] demonstrate the absence of negligence." *Id.* The presence of even "effective" mechanisms merely provides "some evidence of due care on the part of the employer"; it is not dispositive. *Id.* Indeed, the *Lehmann* court quoted, in the midst of the above paragraph, a passage stating that what is required is "an unequivocal commitment from the top that is not just in words but backed up by consistent practice." *Id.* at 621, 626 A.2d 445.[20]

The jury charge reflects this complexity. In section 16(a), after describing employer policies, we instructed the jury that, "the absence of one or more of the foregoing does not automatically constitute employer negligence, nor does their presence automatically demonstrate the absence of negligence. Rather, their presence or absence are factors you should evaluate in determining whether the employer has acted negligently." In section 16(b), we referred back to this language in discussing "establishing a well-publicized and effective grievance procedure as previously described." The latter portion of that sentence

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[20] We note, in passing, that in our view the Title VII and NJLAD standards are probably more different in theoretical expression than in practical application. The *Bouton* shield applies only to "effective" procedures that are known to the plaintiff. The *Lehmann* court held that even "effective" procedures are not necessarily shields. In practice, both standards hinge on effectiveness, which depends on how much teeth upper management gives to its policies. Under either standard, policies that are printed and then forgotten in the filing cabinet of corporate counsel will not protect an employer.

was intended to re-direct the jury's attention to our comprehensive discussion of such policies two paragraphs previously.

The use of the word "all," which appears to be a particular bugaboo of the ACPD, is well supported in the law. The source of this language, which the ACPD asserts is "completely contrary to the state of the law under the [NJLAD]," ACPD Brf. at 56, is in fact New Jersey's Model Jury Charges § 2.22G (ICLE 4th ed. 1992). The model charge uses the same language we used, and supports it with citations to 29 C.F.R. § 1604.11(f), its source, and *Meritor Savings v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986).

It should be noted, as well, that the word "all" arises only in the context of an employer's response once it has "reason to believe that harassment may have occurred." An employer has a higher obligation once it becomes aware of misconduct. If an employer knows that harassment has taken place, it is required to take prompt and effective remedial action. Taking one reasonable step, or two reasonable steps, or even "some" reasonable steps may not prove adequate and effective. If an employer does not take every step that is reasonable in responding to a known instance of sexual harassment, a jury may find that the employer's response was inadequate and ineffective.[21]

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[21] As previously noted, the ACPD submitted two separate versions of that portion of its brief which dealt with the jury charge. The first version of the ACPD's brief challenged a draft version of the jury charge, which had required an employer to take "all steps necessary to address sexual harassment." The

Because the *Lehmann* standard does not dictate the legal significance of anti-harassment policies and procedures, our charge merely states that they are factors that must be evaluated in attaching liability to employers. We thus instructed the jury to "consider" these factors. A jury which is told to "consider" employer policies and procedures can only surmise that the presence of such policies and procedures suggests that an employer is at least trying to prevent harassment. The ACPD made this argument to them innumerable times; the jury concluded that it did not try hard enough.

Whatever the legal merits of the non-supervisory employee portion of the charge,[22] it played an insignificant role in the outcome of this case. There was ample evidence that (1) ACPD upper managers knew or should have known of the harassment, in which case they were required to act whether Hurley complained or not,[23] and (2) upper managers themselves actively participated in the harassment. Indeed, the jury found liability against Madamba for actions that were within the scope of his

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ACPD criticized the "all steps" formulation and informed the Court that "the law requires only that the employer take all 'reasonable' steps necessary." ACPD Brief (version one) at 56. Based on similar arguments in chambers, the Court adopted the phrase "all reasonable steps" in its final charge.

[22] The ACPD has raised no objection to section 16(a) of the charge, which relates to supervisory employees.

[23] *See e.g., Andrews*, 895 F.2d at 1486 ("if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the employer will be liable.")

employment, which automatically creates respondeat superior liability as to the ACPD.[24] Given the overwhelming evidence that upper management knew (or should have known) of the harassment and failed to respond, as well as direct respondeat superior liability through Madamba, this portion of the charge has little legal significance in establishing the ACPD's liability.

Finally, because the ACPD faced both Title VII and NJLAD liability, we believe it was entirely appropriate to use as a standard for employer liability the seemingly lower threshold of employer liability provided for under New Jersey law. It would be unfair to require a jury to apply the higher standards of Title VII law when the defendant is charged with, and potentially liable for, violating the lower standards of the NJLAD. The NJLAD standard is lower than and thus inclusive of Title VII

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[24] The law under the agency principles set forth in *Lehmann* is that an employer is liable for the wrongful actions of a supervisory employee who is acting within the scope of his employment. Although this exceptionally broad formulation did not create particular difficulties in the case at bar (other than the virtually unworkable complexity of the agency principles upon which *Lehmann* relies, as applied in the context of sexual harassment), we can envision a case in which the absoluteness of this standard of liability could become problematic. For example, where a low-level supervisory employee in a very large corporation engages in harassment while acting in the scope of his employment, and his employer takes prompt and effective remedial action in response thereto, we are not confident that employer liability should be imposed. Such issues are not, however, presented in the case at bar: Madamba was not so lowly, the ACPD is not so large, other supervisors were aware of the conduct, and the ACPD took no remedial action whatever.

liability in this respect. We charged the lower standard for the same reason that we declined to charge the jury with respect to plaintiff's § 1983 claim: the lower standard incorporates the higher one. All the jury need find for liability to attach is a violation of the lower standard.

5. *Compensatory Damages (§ 21)*

Defendant Madamba also challenges our compensatory damages charge. There was no objection to this charge previously, and the basis of Madamba's present objection is difficult to discern from his brief. The kernel of Madamba's argument seems to be contained in the following sentence: "the jury should have been specifically instructed in the damage section that it cannot award damages for any conduct that plaintiff was not subjected to, aware of, or with respect to Madamba, which occurred prior to 1990." Madamba Brf. at 49.

Two arguments appear to be nestled within this sentence. The first is that the charge should have limited damages to conduct that Hurley was "subjected to" or at least "aware of." Madamba concedes, correctly, that this point was made earlier in the charge, but believes it should have been reemphasized here. We fail to see why. The charge limited damages to those proximately caused by the "conduct of the defendant in question," the jury having previously been instructed on the importance of evaluating the defendants independently. The jury was instructed only to award damages for plaintiff's actual injuries. We emphasized proximate cause, the defendant's conduct, and the requirement that plaintiff must actually have been injured. The link to the defendant and the

requirement that plaintiff have suffered actual harm from the defendant's conduct could not have been plainer.

Moreover, we do not believe it is the law that a sexual harasser is liable only for the conduct that a plaintiff is "subjected to" or "aware of." As we instructed the jury in section 14(b), "Plaintiff's hostile work environment claim must relate to conditions which actually altered her own work environment. Statements, actions, or conditions which occurred at the Atlantic City Police Department outside the presence of plaintiff, and of which plaintiff was unaware, cannot be considered part of the hostile work environment *unless you find that such statements, actions or conditions affected plaintiff's own work environment*" (emphasis added). In other words, what matters is not whether a plaintiff is "aware of" or "subjected to" particular conduct, but rather whether that conduct actually affected plaintiff's work environment. A plaintiff might well be unaware of specific conduct by a supervisor which nevertheless dramatically affects her work environment. Although plaintiff may never have been "aware of" the conduct or directly "subjected to" it, liability may attach nonetheless if the conduct creates a hostile environment which harms her.

The second argument seems to be that the jury should have held Madamba liable only for the amount of harm he caused himself, and not for harm caused by others or before 1990. Although Madamba does not raise the point directly, in essence he seems to want apportionment of damages. Madamba never raised this point previously. The ACPD raised it once in a charge conference at which Madamba's attorneys were present. Plaintiff's counsel and the Court both pointed out that joint and

several liability was the general rule. The Court then informed all counsel that anyone who wanted apportionment could submit briefs on the subject for our consideration. No one ever did.

The overwhelming weight of authority is that compensatory damages may not be apportioned among joint tortfeasors absent explicit statutory authorization. *See* 74 AmJur2d, Torts, § 76-80 and Trial, § 1796. There is no statute authorizing apportionment in this case, and we think it was perfectly appropriate to follow the general rule of joint and several liability. At least one other hostile work environment case under Title VII has reached a similar conclusion. *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 506 (1st Cir. 1996); *see also Keenan v. City of Philadelphia*, 983 F.2d 459, 463 (3d Cir. 1992).

The purpose of the rule of joint and several liability is well served in this case. Madamba argues that he should be held responsible only for the damages he caused during his year of supervising Hurley. The fallacy of this argument is that it is virtually impossible to splice damages. The ACPD, Madamba, and numerous other persons not parties to this case probably contributed to Hurley's injury. No one can say with precision who caused how much of it.

Even if we were to attempt to apportion liability, it is clear that Madamba contributed significantly to the damage Hurley suffered. Under his supervision some of the worst harassment took place – to the point that ultimately, after having worked at the ACPD for 12 years prior to her assignment to Charlie Platoon, Hurley was forced to take a year's sick leave. Substantial evidence

indicated that Madamba himself participated directly in that harassment. And although harassment by non-supervisory employees is certainly harmful, the jury could have concluded that harassment by an immediate supervisor greatly exacerbated Hurley's damages.

E. *Punitive Damages*

A threshold issue with respect to punitive damages is whether they may be awarded against a municipality at all. We believe that imposing punitive damages against a governmental entity has the unfortunate effect of inflicting punishment primarily on innocent taxpayers rather than on the wrongdoer, *see Keenan v. City of Philadelphia*, 983 F.2d 459, 477 (3d Cir. 1992) (dissenting opinion), but the New Jersey legislature and courts have determined that exemplary damages against municipalities should be permitted.[25]

The ACPD may be liable for punitive damages "only in the event of actual participation by upper management or willful indifference." *Lehmann*, 132 N.J. at 624-25, 626 A.2d 445; *Rendine v. Pantzer*, 141 N.J. 292, 314, 661 A.2d 1202 (1995).[26] Conduct more egregious than the mere

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[25] For an explanation of our reasons for believing that punitive liability may rest in New Jersey against a municipality, we refer the reader to our summary judgment opinion in this case. *Hurley v. Atlantic City Police Department*, 1995 WL 854478 at *15 (D.N.J. 1995) (Irenas, J.). The ACPD does not now raise the issue of the legal availability of punitive damages against a municipality. Its present motion challenges their appropriateness on the facts of this case.

[26] Although the ACPD has not challenged the absence of this precise phrasing from our jury charge in its written post-trial submissions to the Court, ACPD counsel did allude to the

violation of the NJLAD is needed to support an award of punitive damages. *Catalane v. Gilian Instrument*, 271 N.J. Super. 476, 501, 638 A.2d 1341 (App. Div. 1994); *Weiss v. Parker Hannifan Corp*, 747 F. Supp. 1118 (D.N.J. 1990).

The ACPD argues that there was no evidence of actual participation or willful indifference on the part of upper management. In addition, the ACPD argues that the jury acted illogically when it imposed punitive liability on the ACPD but not on Madamba, the principal upper manager who was involved.

Both of these arguments are unpersuasive. The conduct of the ACPD in this case meets the legal standards for liability. There was substantial evidence of actual sexual harassment by upper management, most notably by co-defendant Madamba, whom the jury found to be liable for his actual participation in sexual harassment. (The ACPD does not dispute that Madamba was a member of upper management.) The jury found that Madamba was, with the ACPD, jointly liable for more than half a million dollars in compensatory damages for his acts of sexual discrimination.

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issue at oral argument on the post-trial motions. We think the punitive damage and employer liability charges we gave properly presented the law. Moreover, neither the ACPD nor any other party ever proposed this language either in written proposed charges or orally at any of the charge conferences we held. The ACPD did propose this language after punitive liability had been established by the jury's verdict of February 2, 1996, but by that point the jury had already established punitive liability and all that remained was to determine the amount of punitive damages. Their submission was simply too late.

There was still more evidence of willful indifference on the part of upper management. Hurley turned to Madamba for help; he only made things worse. Rifice never interceded forcefully. There was a widespread atmosphere of sexual discrimination which was apparent in the language used towards and in reference to female employees, the graffitti, the sanitary napkin, the dildo, and the job assignments given to women. Although this conduct could not possibly have escaped the attention of ACPD upper management, no one ever did anything to stop it. There was more than enough evidence from which the jury could have concluded that ACPD upper management showed "such a conscious and deliberate disregard of the interest of others that [its] conduct may be called willful or wanton." W. Prosser & W.P. Keeton, *Prosser and Keeton on Torts*, § 2, at 10 (5th Ed. 1984).

The ACPD knew or should have known of the harassment by Madamba and others and failed to stop it. Its repeated failure to act or even investigate obvious incidents of egregious sexual harassment could permit a jury to conclude that ACPD leadership was wilfully indifferent to – or even condoned[27] – sexual harassment. Indeed, based solely on the manner in which the ACPD chose to conduct this trial (for example by relying on its written policies as justification for its failure to respond more strongly) the jury could reasonably have concluded

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[27] To give one example, Commander Robert Schwarz testified that he did not attempt to put a stop to the sanitary napkin incident or the graffiti because he feared reprisals from more senior officers. (Tr. 160.)

that further punishment was necessary in order to compel the ACPD to take stronger steps to fulfill its legal obligations towards its female employees.

Nor was it inconsistent of the jury to find punitive liability against the ACPD and not against Madamba. The ACPD's liability is established on different grounds from Madamba's. The ACPD's liability arises in two ways: through respondeat superior for the actions of its supervisors (including Madamba), and as a result of its reaction (or, as in this case, non-reaction) to the acts of both supervisory and non-supervisory employees.

It is not unforeseeable that in some work environments certain employees will engage in sexual harassment, and it is even more predictable in a male bastion such as a police department. Indeed, the need for a vigilant and responsive approach to sexual harassment ought to be more obvious to managers in such environments than it might be to managers of more refined or gender-integrated workforces.

Unlike Madamba, the ACPD may be held liable for its failure to respond to known acts of sexual harassment by others. Thus, in addition to the ACPD's respondeat superior liability for Madamba's affirmative conduct, it also faced liability for the failure by Madamba, Rifice, and other supervisors to actively protect Hurley from obvious harassment. For example, while Madamba may not have been personally liable for his failure to remove the sanitary napkin or respond forcefully to the graffiti, the jury could find that the failure by Madamba and other supervisory employees to respond to such obvious

harassment constituted willful indifference on the part of the ACPD.

A similar situation is presented by plaintiff's memo to Madamba dated November 1, 1990, in which she requested a transfer and outlined the sexual harassment to which she had been subjected. Madamba responded, appropriately, by forwarding her memo to the Chief of Police along with a memo of his own requesting that an internal affairs investigation be conducted. Nevertheless, the ACPD willfully ignored both the allegations in Hurley's memo and Madamba's request.

In short, the bases for Madamba's punitive liability are different from those applicable to the ACPD. The jury could reasonably have concluded that Madamba's affirmative conduct, while inexcusable, merited only compensatory damages, whereas the combination of actual participation and willful indifference by ACPD upper management warranted a substantial punitive award.

Moreover, the jury charge was perfectly clear in stating that the imposition of punitive liability was a matter of *discretion* on the part of the jury: "An award of punitive damages is discretionary. In other words, if you find that the legal requirements for punitive damages are met, you may award punitive damages, or you may elect not to award punitive damages." Jury Charge § 23. It was well within the province of the jury to elect not to award punitive damages against Madamba even if the jury believed that Madamba's conduct was so malicious and wanton as to qualify for punitive damages.

We cannot say, given the facts of this case, that the jury's decision was not based upon substantial evidence.

Punitive damages punish a defendant, prevent him from repeating his sins, and provide an object lesson to others, as we instructed the jury. It was perfectly rational for the jury to have decided that these goals would not be furthered by imposing punitive liability against Madamba, but would be advanced by punishing the ACPD. We cannot even fault the jury's exercise of discretion: its distinction between Madamba and the ACPD shows careful judgment and a clear understanding of the differing grounds for individual and employer liability.

F. *Remittitur*

1. *Compensatory Damages*

Both Madamba and the ACPD argue that the compensatory damages award should be remitted. Although plaintiff asserts that the practice of remittitur violates the Seventh Amendment, that argument, weak to begin with, has been completely foreclosed by the recent Supreme Court cases of *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996) and *Gasperini v. Center for Humanities*, ___ U.S. ___, 116 S. Ct. 2211, 135 L.Ed.2d 659 (1996).

"A remittitur is in order when a trial judge concludes that a jury verdict is 'clearly unsupported' by the evidence and exceeds the amount needed to make the plaintiff whole, i.e., to remedy the effect of the employer's discrimination." *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1100 (3d Cir. 1995), citing *Spence v. Board of Educ. of Christina School Dist.*, 806 F.2d 1198, 1201 (3d Cir. 1986). A court should not lower a damage award merely because it would have chosen to award less money, but

there must be a "rational relationship between the specific injury sustained and the amount awarded." *Gumbs v. Pueblo Intern., Inc.*, 823 F.2d 768, 773 (3d Cir. 1987). A court may look at awards in similar cases in determining whether an award is excessive. *Sassaman v. Heart City Toyota*, 879 F. Supp. 901, 911 (N.D. Ind. 1994); *Abrams v. Lightolier*, 841 F. Supp. 584, 593 (D.N.J. 1994), *aff'd* 50 F.3d 1204 (3d Cir. 1995); *Garrison v. Mollers North America, Inc.*, 820 F. Supp. 814, 822 (D. Del. 1993).

Awards for emotional distress in discrimination cases arising under § 1983, § 1981, and Title VII rarely come close to $575,000, and typically are for less than $50,000. *See, e.g., Sassaman*, 879 F. Supp. at 907 (judgment for $2,000 in compensatories and $20,000 in punitives under Title VII hostile work environment claim); *Fernot v. Crafts Inn, Inc.*, 895 F. Supp. 668 (D. Vt. 1995) ($48,000 awarded for severe emotional distress with physical manifestations where plaintiff subjected to sexual comments, unwanted physical contact, and termination); *Carter v. Duncan-Huggins*, 727 F.2d 1225 (D.C. Cir. 1984) ($10,000); *Dombeck v. Milwaukee Valve*, 823 F. Supp. 1475 (W.D. Wis. 1993), *vacated on other grounds*, 40 F.3d 230 (7th Cir. 1994) ($25,000 awarded for anxiety disorder caused by sexual harassment and improper touching); *Odima v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995) ($10,000); *EEOC v. AIC Security*, 55 F.3d 1276 (7th Cir. 1995) ($50,000); *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) (remittitur from $55,000 to $15,000 appropriate for emotional distress damages in discrimination case against Chicago Police Department).

Discrimination cases granting awards in the realm of $500,000 have generally involved measurable economic

damages, *see, e.g., Wilmington v. J.I. Case Co.*, 793 F.2d 909 (8th Cir. 1986); *Lipsett v. University of Puerto Rico*, 759 F. Supp. 40 (D.P.R. 1991), or may be viewed as somewhat anomalous, *Eckmann v. Board of Educ. of Hawthorn School Dist.*, 636 F. Supp. 1214 (N.D. Ill. 1986) (remittitur from $2 million to $750,000 where teacher was terminated for unwed pregnancy). Where very large awards have not involved concrete economic damages, they have often been subject to remittitur or been vacated. *See, e.g., Chonich v. Wayne County Comm. Coll.*, 874 F.2d 359 (6th Cir. 1989); *Vance v. Southern Bell*, 672 F. Supp. 1408 (M.D. Fla. 1987), *aff'd in part, rev'd in part* 863 F.2d 1503 (11th Cir. 1989); *Fitzgerald v. Mountain States Telephone and Telegraph Co.*, 68 F.3d 1257, 1265 (10th Cir. 1995) (jury verdict of $250,000 for emotional distress damages found clearly excessive in sex discrimination case).

Under the NJLAD, no reported case has ever even approached the $575,000 jury award here. Cases involving high awards for emotional distress have been vacated. *See Jackson v. Consolidated Rail Corp.*, 223 N.J. Super. 467, 538 A.2d 1310 (App. Div. 1988) (over $500,000 jury award in case involving racial harassment leading to discharge led trial judge to order new trial on damages); *Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 499, 638 A.2d 1341 (App. Div. 1994) (new trial ordered where $250,000 emotional distress damages in an age discrimination case "shocked the conscience of the court"). The single largest reported compensatory damages award for emotional distress under the NJLAD was $125,000. *Rendine*, 141 N.J. at 311, 661 A.2d 1202

(1995).[28] There, plaintiffs alleged that their employment had wrongfully been terminated when they became pregnant; in the case at bar, of course, plaintiff never lost her job.

In *Abrams*, 841 F. Supp. at 593, a district court remitted a $100,000 jury award to $2,500 for pain and suffering under the NJLAD. In so doing, the court reviewed NJLAD case law and noted that "New Jersey courts have been careful to award such damages only in cases where the record demonstrates a 'substantial basis for compensation.' " *Id.* The court further observed that under the NJLAD, awards for pain and suffering have been "nominal, ranging from $500 to $1,500." *Id.*

Plaintiff has presented expert testimony to the effect that she suffers from an adjustment disorder, anxiety, and depression arising from defendants' conduct. She takes the antidepressant medication Prozac daily. (Tr. 1651-1652.) She feels agitated, fearful, and unable to control her life. (Tr. 1649-1650.) She has testified that the harassment has had a negative effect on her relationship with her husband and children. (Tr. 1732.) She was compelled as a result of the harassment to take a stress leave from work. (Tr. 1840.) The damage may have long-lasting effects. (Tr. 1736.)

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[28] In *Milazzo v. Exxon Corp.*, 243 N.J. Super. 573, 580 A.2d 1107 (Law Div. 1990), a jury awarded a plaintiff who alleged handicap discrimination under the NJLAD $276,144 in compensatory damages and $100,000 in punitive damages. Because the opinion was cursory, the facts of the case are unclear, whether judgment was entered for that amount is unclear, and whether the compensatory amount included concrete economic damages is unclear.

On the other hand, plaintiff has lost no pay or benefits as a result of the harassment. (Tr. 2799.) She suffered no physical injury or even physical contact. And testimony by the defendants' expert, Dr. Toborowsky, strongly suggests that the difficulties plaintiff has faced and continues to face are rooted in sources other than workplace harassment, such as a troubled childhood marked by sexual molestation, abandonment, and foster homes; physical abuse by both of her husbands; and other severe personal, marital and family problems unrelated to her work environment. (Tr. 4598.)

Indeed, plaintiff's own psychological expert conceded that plaintiff had a history of depressive illness before ever working on Charlie Platoon. (Tr. 1843.) And in spite of the conduct to which plaintiff was subjected in 1990, she did not attempt to see a psychiatrist about the emotional difficulties that conduct allegedly caused until 1993. (Tr. 4601.) She did not meet with Dr. Hoyme to discuss the events of 1990 until August 1994. (Tr. 1658.) Dr. Hoyme also testified that plaintiff's psychiatric condition could be characterized as one of the "most mild" conditions (Tr. 1773), and that her prognosis for a full recovery was good (Tr. 1734, 1740).

We find that in the circumstances of this case the jury's evaluation of compensatory damages was so excessive as to shock the judicial conscience. This is not to say that the jury was so inflamed that the verdict must be set aside. But the jury allowed its outrage and disgust at the conduct to which Hurley was exposed and its sympathy for her psychological and emotional trauma – much of which is probably unrelated to her work environment –

to overcome cool reason in setting compensatory damages.

Remittitur is thus appropriate. In setting a new figure, we rely primarily on our evaluation of the evidence presented in this case and only secondarily on awards in comparable cases. We also give due deference to the jury's obvious belief that a large award is called for. In addition, we take some guidance from Title VII, which New Jersey courts have acknowledged as a powerful influence on the NJLAD, and which creates a sliding scale of maximum liability, ranging from a cap in damages at $50,000 for employers with fewer than 101 employees to a cap of $300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a. *See Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 202 (E.D. Pa. 1996) (remitting compensatory damages in discrimination case from $1,000,000 to $100,000 and punitives from $3,000,000 to $300,000).

Taking all of these factors into consideration, we hold that a compensatory damages award of $175,000 is appropriate in this case. An award in this range is considerably better supported in the case law than the $575,000 of emotional distress damages awarded by the jury. *See, e.g., Rendine,* 141 N.J. at 311, 661 A.2d at 1202 (1995) ($125,000); *Arnold v. City of Seminole,* 614 F. Supp. 853 (N.D. Okl. 1985) (female police officer awarded $150,000 for severe emotional distress as evidenced by post-traumatic stress syndrome and her inability to work arising from harassment that included vulgar comments, sexually graphic graffiti, and disparaging comments about women police officers); *Rowlett v. Anheuser-Busch,* 832 F.2d 194 (1st Cir. 1987) ($123,000 awarded to victim of

racial discrimination); *Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1992) (five plaintiffs in police sex discrimination case awarded, respectively, $220,000, $175,000, $175,000, $40,000 and $30,000).

Even an award of $175,000 may be high in light of the testimony that many of Donna Hurley's emotional problems were not caused by her work environment. Nevertheless, it is plain that the harassment Donna Hurley faced at work caused her serious harm. Indeed, she was compelled to leave work on stress leave for a year. (Tr. 1840.) Although Hurley clearly had emotional difficulties which preceded the workplace harassment, and it is possible that the harassment she faced would not have caused the "average woman" so much harm, the defendants must take their victim as they find her. *Avitia v. Metropolitan Club of Chicago*, 49 F.3d 1219, 1227 (7th Cir. 1995). The remitted award of $175,000 is therefore appropriate.

2. *Punitive Damages*

The ACPD has not moved for remittitur of the punitive damages verdict, so we will address the issue *sua sponte*. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991). The Supreme Court has recently established three "guideposts" by which to analyze an award of punitive damages: (1) the reprehensibility of the conduct; (2) the relation between the harm actually inflicted and the punitive award; and (3) the amount of civil or criminal penalties to which the conduct might give rise. *BMW of North America v. Gore*, ___ U.S. ___, ___, 116 S. Ct. 1589, 1598, 134 L.Ed.2d 809 (1996). (The

third factor is not, in our view, particularly relevant to this case.) Similarly, New Jersey has held that a punitive award should take into account the nature of the wrongdoing, the extent of the harm inflicted, the intent of the wrongdoer, and the wrongdoer's wealth, as well as any mitigating circumstances. *Leimgruber v. Claridge Associates*, 73 N.J. 450, 375 A.2d 652 (1977).

The purpose of punitive damages is to punish the defendant and deter him and others like him from erring again. Where the cost of a punitive award is being passed along to innocent taxpayers, as here, it is difficult to decide what amount is proper punishment. This is especially true since, in New Jersey, the financial worth of the defendant must be taken into account – a factor that is difficult to assess and which affords little real guidance when a municipality is involved. *Herman v. Sunshine Chemical*, 133 N.J. 329, 627 A.2d 1081 (1993); *see also Pulla v. Amoco*, 72 F.3d 648, 659 (8th Cir. 1995). The City of Atlantic City has a tax base of slightly less than $7 billion. For every $100 of assessed value, each taxpayer will pay a penny because of this verdict. Such a small imposition cannot be said to be out of all proportion to the wealth of the defendant, nor is there any risk that this award will bankrupt the City. *See Arceneaux v. Merrill Lynch*, 767 F.2d 1498 (11th Cir. 1985).

As discussed in Part E, *supra*, a jury could certainly find that the ACPD's conduct in this case was sufficiently reprehensible to merit a sizeable sanction. An unprofessional atmosphere of intolerance and misogyny suffused the ACPD. Some of the harmful conduct in this case involved upper management directly. Many other incidents did not directly involve supervisors but could not

have escaped the notice of ACPD senior officers, who remained willfully indifferent to the misconduct. Under these circumstances, we cannot say that the imposition of a punitive liability that is four times the remitted amount of compensatory damages[29] on an entity with a $7 billion tax base, and which arises from serious misconduct, is so outlandish as to shock the judicial conscience.

Retired Supreme Court Justice Byron White, sitting by designation in the Eighth Circuit, has adopted a fourth analytical factor in reviewing a punitive damage award: the likely potential harm to others arising from the complained-of conduct. *Pulla*, 72 F.3d at 659. In this case, the ACPD's conduct created an environment that may have harmed not only Donna Hurley and her family but also other women (and perhaps men) in the department and their families. The ACPD knowingly exposed many of its employees to a hostile environment, and the aggregate harm they suffered could well be substantial. This consideration is an additional factor supporting the jury's measurement of punitive damages.

Our remittitur of compensatory damages may not be entered without the consent of the plaintiff. 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, Civil § 2815 (West 1995). In *Spence v. Bd. of Educ. of Christina School Dist.*, 806 F.2d 1198, 1201-02 (3d Cir. 1986), the Third Circuit noted that, "an issue may not be isolated for a new trial 'unless it clearly appears that

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[29] The Third Circuit has recently upheld a punitive damages award of $350,000 in a sex discrimination case involving only $15,000 in compensatory damages – a ratio of more than 23:1. *Coleman v. Kaye*, 87 F.3d 1491 (3d Cir. 1996).

the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice,' " citing *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 51 S. Ct. 513, 75 L.Ed. 1188 (1931). In the case at bar, the issues of liability and damages are too interwoven to allow a fair determination of damages apart from liability. Accordingly, our denial of defendants' motion for a new trial will be conditioned upon plaintiff's filing an acceptance of a remittitur of compensatory damages exceeding $175,000. Should plaintiff not so consent, a new trial as to both liability and damages will be held.

G. *Plaintiff's Motion for a New Trial*

Plaintiff moves for a new trial against Rifice on all issues and against Madamba on the issue of punitive damages. Rifice's conduct towards the plaintiff was generally ambiguous. Even those actions which plaintiff perceives as harmful, such as denying funeral leave, are subject to conflicting interpretations. The jury considered the evidence against Rifice and concluded that he did not engage in discriminatory conduct. Their conclusion was amply supported by the evidence. The motion for a new trial as to Rifice will be denied.

Plaintiff also argues that a new trial should be held with respect to Madamba's liability for punitive damages. Plaintiff argues that Madamba's conduct was so egregious as to warrant punitive damages. Her argument misses the point. As our charge indicated, an award of punitive damages is discretionary. Whatever the jury may have thought of Madamba's conduct, it elected not to

award punitive damages. Given Madamba's individual liability for substantial compensatory damages, we cannot even fault the jury's exercise of discretion, much less find it unsupportable as a matter of law. The motion will be denied.

H. *Counsel Fees*

The respective attorneys for Mooney, Rifice, and Hurley have moved for attorney's fees. We shall treat each in turn.

1. *Defendant Mooney*

The fee-shifting standards for prevailing defendants differ from those for prevailing plaintiffs. *See Sassaman*, 879 F. Supp. at 914. A prevailing defendant may rely on Title VII's fee-shifting statutes, 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k), only if the court finds that the plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 98 S. Ct. 694, 54 L.Ed.2d 648 (1978). Under the NJLAD, "no attorney's fees shall be awarded unless there is a determination that the charge was brought in bad faith." N.J.S.A. 10:5-27.1. That a plaintiff ultimately lost does not mean the claim was frivolously brought. *Carrion v. Yeshiva University*, 535 F.2d 722 (2d Cir. 1976). The award of attorneys' fees to a prevailing defendant is "not routine" and should only "be sparingly awarded." *Quiroga v. Hasbro, Inc.*, 934 F.2d 497 (3d Cir. 1991).

The evidence in the instant case strongly indicates that the plaintiff had ample basis, as a factual matter, for believing that Mooney had sexually harassed her. In essence, plaintiff alleged that Mooney had, on numerous occasions, made obscene sexual remarks to her in front of other officers which made her feel insulted, embarrassed, unwelcome and humiliated. Plaintiff clearly alleged that she believed that Mooney was a major factor in creating the hostile work environment she faced.

The Court granted Mooney's motion for summary judgment for legal reasons. In its opinion dated August 4, 1995, the Court dismissed plaintiff's Title VII claims against Mooney on the grounds that Title VII liability will not lie against a non-supervisory employee. The Court rejected plaintiff's argument that Mooney was a supervisor. *Hurley,* 1995 WL 854478 at *8. The Court granted Mooney's motion on the NJLAD claim for similar reasons. *Id.* at *10.

Our decision on these three legal issues was hardly self-evident. The issue of whether Title VII liability may lie against an individual has been hotly debated, and was unclear in this Circuit at the time the summary judgment motions were filed. Indeed, this court had held previously that individual liability could lie under Title VII. *Bishop v. Okidata,* 864 F. Supp. 416 (D.N.J. 1994) (Irenas, J.). As explained in part D-3, *supra,* it now seems probable that Title VII liability will not lie against an individual in this Circuit. The issue of whether Mooney was legally Hurley's supervisor was at least debatable. *See Cook v. Applied Data Research,* 1989 WL 85068 (D.N.J. 1989); *Guyette v. Stauffer Chemical Co.,* 518 F. Supp. 521, 525 (D.N.J. 1981).

More importantly, the law of individual liability under the NJLAD was, and to a certain extent still is, largely unsettled. As we noted in our initial *Hurley* opinion, no New Jersey Court had squarely addressed the issue. *Hurley*, 1995 WL 854478 at *10. There was substantial statutory authority under N.J.S.A. 10:5-12(e) to support plaintiff's good-faith belief that individual liability could be imposed on those who "aid or abet" misconduct. *See Tyson*, 918 F. Supp. at 836. Although we ultimately held in both *Hurley* and *Tyson* that co-workers may not be held liable, plaintiff's argument was not ill-founded or brought in bad faith.

An action cannot be deemed frivolous or groundless when based upon an unsettled question of law. *See, Christiansburg*, 434 U.S. at 422, 98 S. Ct. at 700-01; *EEOC v. Children's Hospital of Pittsburgh*, 556 F.2d 222 (3d Cir. 1977). Although plaintiff's arguments with respect to Mooney did not ultimately prevail, there was sufficient uncertainty in the law, both as a theoretical matter and as applied to the facts of this case, that we cannot find that plaintiff's suit against Mooney was frivolous or brought in bad faith. Mooney's fee application will therefore be denied.

2. *Defendant Rifice*

The evidence of direct sexual harassment by Rifice was notably weak. Hurley herself complained of only five affirmative acts by Rifice: (1) he transferred her to the Property and Evidence Unit; (2) he denied her access to Chief McDuffie; (3) he denied her a three-percent pay

raise; (4) he denied her funeral leave; and (5) he condoned Internal Affairs investigations regarding her. Each of these acts is subject to conflicting interpretations. Of course, the evidence that Rifice was aware of Hurley's plight and ignored it was considerably stronger.

We have said from the beginning that we did not believe that the case against Rifice was terribly strong. Nevertheless, there was enough factual uncertainty to warrant denial of the motion for summary judgment, a motion to reconsider, and sundry motions to dismiss that were made as the case progressed. In our opinion denying summary judgment as to Rifice, we wrote that, "as to Rifice, plaintiff has adduced evidence that in his supervisory capacity as Inspector and then Chief of Police, he was woefully indifferent to her complaints regarding sexual harassment and obscene graffiti on the walls in the ACPD facilities." *Hurley*, 1995 WL 854478 at *15. Following Rifice's motion to reconsider that decision, we held that, "on the basis of this record, the Court simply cannot conclude that the NJLAD claim against Rifice is without merit." Opinion on Reconsideration at 5.

Although the jury's verdict confirmed our initial view of the case against Rifice, it would be unfair to expect the plaintiff to have possessed, more than a year ago, the understanding of the legal and factual implications of the case that we developed only during the course of trial. Moreover, it was unclear, as a legal matter, whether individual liability could be imposed on a supervisory employee for his inaction. Given that the Court was unsure whether liability could attach to Rifice's conduct, we see no reason why plaintiff should have withdrawn her case voluntarily. Plaintiff's suit against Rifice

was not frivolous, nor was it brought in bad faith. Rifice's motion for fees will therefore be denied.

3. *Plaintiff*

Title VII, the NJLAD, and § 1983 all permit fee shifting in favor of a prevailing plaintiff. *See* 42 U.S.C. § 1988(b); 42 U.S.C. § 2000e-5(k); N.J.S.A. 10:5-27.1. In this case, an award of attorney's fees to plaintiff's counsel is unquestionably appropriate. Calculation of the fee amount under the three statutes differs only slightly, in ways that will be developed below.

Plaintiff's attorney seeks an award based on the following hourly rate schedule and billing record:

* Clifford Van Syoc –	
1,153.6 hours @ $300/hour –	$346,080.00
* Benjamin Folkman –	
254.65 hours @ $225/hour –	$ 57,296.25
* Evan Blaker –	
233.8 hours @ $175/hour –	$ 40,915.00
* Junior Associates –	
512.6 hours @ $115/hour –	$ 58,949.00
* Law Clerks –	
433.05 hours @ $85/hour –	$ 36,809.25
* Paralegals –	
826.25 hours @ $60/hour –	$ 49,575,00
	$589,624.50

In addition to this "lodestar" figure, *see Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-68 (3d Cir. 1973); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116-117 (3d Cir. 1976), Mr. Van Syoc argues that the lodestar should be increased to account for the high quality of the representation, the successful result, the "hard-nosed" opposition by the defense, a contingency enhancement, and prejudgment interest on the compensatory damages award.

Defendants have argued that both the hourly rates and the hours expended are excessive. We agree that Mr. Van Syoc's proposed hourly rates are ambitious. The defendants have submitted an affidavit accompanied by a letter from Jack Plackter, Esq., of the law firm of Horn, Goldberg, Gorny, Daniels, Plackter & Weiss. Mr. Plackter writes that his firm charges the following rates: partners, $95-$225; associates, $85-$150; paralegals, law clerks, and other unlicensed legal assistants, $50-$70.

We believe that Mr. Plackter's submitted rates provide a more suitable framework in which to set fees. Based on Mr. Plackter's letter, the other evidence in the record, the Court's close familiarity with the New Jersey legal market, our direct experience with Mr. Van Syoc and his employees, and applicable case law, we will apply the following hourly rates: Mr. Van Syoc: $200.00; Mr. Folkman: $150.00; Mr. Blaker: $115.00; Junior Associates (Allen, Kopelson, Erdek, Byler): $85.00; Law Clerks and Paralegals: $50.00.

We have reviewed the timesheets submitted by the plaintiff's attorney. As a general matter, we do not believe

they are excessive and redundant. The defendants themselves present few specific complaints about the timesheets, relying instead on vague denunciations of excessiveness. This was a grueling litigation for all. Plaintiff's attorney was pitted against a team of defense lawyers; in the courtroom, he routinely faced five adversaries. Although plaintiff's attorney has expended a great deal of time on this case, we see no evidence that it was excessive.

The defendants are correct, however, that the total number of hours expended must be reduced by the number expended in pursuit of unsuccessful claims. In a case in which the plaintiff's claims are based on different facts and legal theories, and in which the plaintiff has prevailed on only some of those claims, a district court should exclude the hours spent on the unsuccessful claims when determining the amount of a reasonable fee. *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 789, 109 S. Ct. 1486, 1492, 103 L.Ed.2d 866 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 435-36, 440, 103 S. Ct. 1933, 1940-41, 1943, 76 L.Ed.2d 40 (1983); *Knight v. State of Alabama*, 824 F. Supp. 1022, 1029 (N.D. Ala. 1993). If a plaintiff does not prevail on all claims and overall obtains only "partial or limited success, a District Court must reduce the award of attorney's fees." *Hensley*, 461 U.S. at 436, 103 S. Ct. at 1941; *Knight*, 824 F. Supp. at 1029.

In particular, the defendants argue that the hours should be reduced by the time plaintiff's attorney spent on: (1) unsuccessful claims against Mooney and Rifice; (2) Patrick Hurley's unsuccessful claim for loss of consortium; and (3) unsuccessful state law claims. We agree.

Plaintiff's claims against Mooney as well as Patrick Hurley's *per quod* claim were dismissed on summary judgment. Plaintiff's claim against Rifice was rejected by the jury. Plaintiff also brought several state law claims that were struck at summary judgment, such as claims under CEPA; New Jersey public policy; intentional infliction of emotional distress; malicious interference with contractual relations; defamation; and false light invasion of privacy.

Hours spent in pursuing these claims must therefore be struck from the lodestar calculations. Rather than attempting to cull that material ourselves from Mr. Van Syoc's timesheets, we will enter an order requiring Mr. Van Syoc to submit to this Court within three weeks a revised timesheet from which the relevant hours have been deleted.[30] Defendants will have two weeks from that time in which to respond to the new timesheets. (These submissions should not be viewed as an opportunity to revisit the issues already decided in this opinion.) The Court will at that time determine whether Mr. Van Syoc has made a good-faith effort to cull his hours and engage,

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[30] We recognize that these claims may be substantially intertwined with the successful claims. *See Sassaman*, 879 F. Supp. at 915 (to the extent unsuccessful claims arise from a "common core of facts," they need not necessarily be barred). Nonetheless, it should not be terribly difficult to remove hours spent with respect to Mooney, Rifice, and Patrick Hurley. As for the unsuccessful state law claims, we suspect they were largely a matter of pleading and required few extra hours. We leave it to plaintiff's attorney to work with his own timesheets.

if necessary, in a more particularized analysis of hours expended.[31]

A lodestar enhancement based on the quality of the representation, a successful result, or the aggressiveness of the defense is not warranted in this case. All these factors are amply accounted for in the lodestar figure. *See Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 566, 106 S. Ct. 3088, 3098-99, 92 L.Ed.2d 439 (1986). An upward adjustment based on the "exceptional quality" of a lawyer's work is only rarely given. *Student Public Interest Research Group v. AT & T Bell Laboratories,* 842 F.2d 1436, 1453 (3d Cir. 1988). Certainly Mr. Van Syoc's performance in this litigation was impressive. Nevertheless, his talents and experience are amply reflected in his high hourly rate, and his hard work is expressed in the hours expended. The lodestar thus takes into consideration his strong performance.

Plaintiff cites *Lipsett v. Blanco,* 975 F.2d 934 (1st Cir. 1992) in support of his argument that the "scorched earth," "Stalingrad Defense" tactics of his adversary warrant an additional enhancement. None of the attorneys in

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[31] The recent case of *Coleman v. Kaye,* 1996 WL 348069 at *20 (3d Cir. 1996), suggests that a hearing may be desirable in determining a reasonable hourly rate. Although the facts of that case are probably distinguishable based on the higher quantum of evidence in the instant record, if any party should desire a hearing we will entertain motions to that effect. Such motions should not be filed until *after* we enter a final order based on Mr. Van Syoc's submission of revised timesheets, and *must* be submitted, if at all, within two weeks of the date of said final order.

this case, including plaintiff's, have made it a point to extend professional courtesies to their adversaries. The conduct of the defense was no worse in this respect than that of the plaintiff; certainly it was not so egregious as to warrant an enhancement. Moreover, the aggressiveness of the litigation is reflected in the hours billed and is thereby incorporated into the lodestar.

A contingency enhancement may not be granted at all under the federal fee-shifting statutes. *City of Burlington v. Dague*, 505 U.S. 557, 112 S. Ct. 2638, 120 L.Ed.2d 449 (1992). In spite of *Dague*, however, the New Jersey Supreme Court has held that in suits under the NJLAD, a contingency enhancement *must* be considered. *Rendine v. Pantzer*, 141 N.J. 292, 661 A.2d 1202 (1995). Defendants argue that we should disregard *Rendine* because we are a federal court, and also because our "hybrid" jury charge failed to establish liability under the NJLAD.

The argument that a federal court applying state law through supplemental jurisdiction may simply ignore the supreme court of the state in which it sits merits no discussion. It is patently wrong. The argument concerning the jury charge merits minimal discussion. We have said from the beginning that we see no significant differences between Title VII and the NJLAD as applied to this case and for purposes of charging the jury. We view the jury's verdict as a finding of liability under Title VII and the NJLAD (although not necessarily under § 1983, which imposes a higher standard for liability than that provided in the charge). That liability was established under the NJLAD is further demonstrated by the jury's finding of liability against Madamba, who faced only NJLAD claims, and by the jury's imposition of punitive damages

on the ACPD, a remedy which is available only under the NJLAD.

We conclude, therefore, that we are required to conduct a *Rendine* analysis. *Rendine* requires us to take into account the prevailing attorney's risk of nonpayment in all contingency cases. *Rendine* suggested that contingency enhancements should ordinarily range between five and fifty percent of the lodestar fee, with the enhancement most often falling between twenty and thirty-five percent. In the present case, Mr. Van Syoc agreed to represent plaintiff on a contingency basis, his payment to depend entirely on eventual success and the fee-shifting statutes.

The parties never came close to settling the case, so Mr. Van Syoc was provided with little opportunity to minimize his downside risk. Hurley's damages were based entirely on her pain and suffering; there was no concrete element. The risk of non-payment in this case was thus reasonably high. On the other hand, plaintiff's case was strong. The concrete evidence of sexual harassment was there. And plaintiff was never willing to reduce her own ambitious settlement demands meaningfully. Under these circumstances (and following the example set by the *Rendine* court, 141 N.J. at 345, 661 A.2d 1202) we find that a contingency enhancement in the amount of one-third of the lodestar fee is warranted in this case.

The final issue before us is the question of pre-judgment interest. Plaintiff moves for pre-judgment interest on the compensatory damages award only. There is some dispute between the parties as to whether or not pre-judgment interest may be applied against a municipality.

Although we need not reach the issue because of our decision not to award such interest as a matter of discretion, *infra*, we note that pre-judgment interest probably is an available remedy under the NJLAD, even against a municipality, for the same reason that we determined in our summary judgment opinion in this case that punitive damages are available. N.J.S.A. 10:5-13; *Abbamont v. Piscataway Bd. of Educ.*, 138 N.J. 405, 425-432, 650 A.2d 958 (1994); *Milazzo v. Exxon Corp.*, 243 N.J. Super. 573, 580 A.2d 1107 (Law Div. 1990). Of course, Madamba would not enjoy immunity from pre-judgment interest even if the ACPD does.

An award of pre-judgment interest lies within the discretion of the trial court. Pressler, 1995 N.J. Court Rules 4:42-11(a); *Ambromovage v. United Mine Workers*, 726 F.2d 972 (3d Cir. 1984). The purpose of an award of pre-judgment interest is to compensate the plaintiff for the defendants' use of plaintiff's money after the cause of action accrued but before judgment was entered. In the case at bar, plaintiff has received adequate compensation for her injuries. She has also received $700,000.00 in punitive damages. Indeed, the punitive damages award is pure windfall. We decline to exercise our discretion to increase the size of that windfall. To do so would indeed result in an "unusual inequity." *Brock v. Richardson*, 812 F.2d 121, 127 (3d Cir. 1987). Accordingly, no pre-judgment interest will be awarded.

VII. CONCLUSION

Because the jury's findings were adequately supported by the evidence presented at trial, and because

there was no prejudicial legal error, the various parties' motions for a new trial will be denied. Defendants' motion for remittitur of compensatory damages will be granted, but the jury's punitive award will stand. The motions by defendants Mooney and Rifice for counsel fees will be denied. Plaintiff's motion for counsel fees will be granted, subject to the submission by plaintiff's counsel of revised timesheets striking hours expended in pursuit of failed claims and parties. An appropriate order will enter on even date herewith.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

July 22, 1999

Mr. Dennis M. Tuohy
Tuohy, Tuohy & Blee
20 S. Tennessee Avenue
Atlantic City, NJ 08401-7138

Re: Atlantic City Police Department
v. Donna Hurley
Application No. A-81

Dear Mr. Tuohy:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on July 22, 1999, extended the time to and including September 8, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Melissa A. Blalock
Melissa A. Blalock
Assistant Clerk

NOTIFICATION LIST

Mr. Dennis M. Tuohy
Tuohy, Tuohy & Blee
20 S. Tennessee Avenue
Atlantic City, NJ 08401-7138

Mr. Clifford L. Van Syoc
200 Lake Drive East
Cherry Hill, NJ 08002

Clerk
United States Court of Appeals for
the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

(2)

No. 99-431

Supreme Court, U.S.
FILED
NOV 15 1999
CLERK OF THE COURT

IN THE

Supreme Court of the United States

THE ATLANTIC CITY POLICE DEPARTMENT,

Petitioner,

v.

SERGEANT DONNA M. HURLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN K. KUDATZKY
Counsel of Record
Sagemore Corporate Center
10000 Sagemore Drive
Suite 10202
Marlton, New Jersey 08053
(856) 988-3131

On the Brief:

CLIFFORD L. VAN SYOC
JAMES E. BURDEN

Attorneys for Respondent

156184

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether, in a sexual discrimination case arising under 42 U.S.C. § 1983, Title VII, and the New Jersey Law Against Discrimination, a general verdict for plaintiff found to be supported by the greater weight of the credible evidence by both the District Court and the Court of Appeals, and resulting from a jury instruction indisputably correct under state law, this Court should review the matter based upon a claim of improper application of the Harmless Error Doctrine.[1]

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1. The Harmless Error Doctrine was codified in 1938, with the adoption of Fed. R. Civ. P. 61.

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Respondent, Donna Hurley, respectfully requests that no Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, entered in this matter on March 18, 1999, and thereafter amended on May 11, 1999.

OPINIONS BELOW

The Opinion of the United States Court of Appeal for the Third Circuit is reported at 174 F.3d 95. (App. 1-103).

The Opinion of the United States District Court for the District of New Jersey is reported at 933 F. Supp. 396. (App. 119-200).

STATEMENT OF JURISDICTION

Respondent refers the Court to the Petitioner's Statement of Jurisdiction.

STATUTORY PROVISIONS INVOLVED

In addition to the two statutes cited by Petitioner, Respondent refers the Court to the New Jersey State statute upon which the Third Circuit relied in its affirmance, N.J.S.A. 10:5-1, *et seq.*, commonly known as the Law Against Discrimination ("LAD").

STATEMENT OF THE CASE

Respondent agrees with the first two paragraphs of Petitioner's Statement of the Case, but objects to most of the factual representations following those paragraphs, inasmuch as they do not set forth the facts in the light most favorable to the Respondent, who prevailed below. Respondent submits the following facts, upon which the Third Circuit relied in its affirmance.

Although New Jersey first enacted the LAD in 1945, Donna Hurley was the first female to successfully complete the Atlantic City Police Academy in 1978. Prior to that time, ACPD female policewomen were required to wear such authoritarian garb as little cowboy hats and skirts. (A1215-16). From the day of her admission into the police academy through the trial of this matter and continuing to date, Donna worked in a malicious and viciously misogynistic environment that was one of gross disrespect, indignities, and indecencies. (A2415-19). Sexist slurs were and are routinely used to refer to females; for example, the police academy trainees were referred to as "the runts and the cunts", with Donna receiving the particularly opprobrious epithet of "the wacky cunt", even from ACPD captains and inspectors. (A412-414; 442; 397-409; 437-440; 503-505; 520-522; 1039-1047; 2388-89). Male police officers were so confident of the ACPD's unwillingness to discipline them for such slurs that Sergeant Yard openly referred to Prosecutor Martha Donovan in a hallway packed with citizens and attorneys as "a fucking cunt", which has not yet resulted in any investigation or discipline by ACPD. (A831-834; 1229-1233). From Donna's initial hiring to the present, derogatory sexist terms were customarily used by the rank and file in the presence of superior officers without fear of adverse consequence, such as referring to female police officers as "cunts", "the crack troops", "douche bags", and "broads", continuing up to the week of trial. (A602-605; 642-644; 655-669; 2388; 2394-97). Madamba, Hurley's immediate supervisor for most of 1990, personally referred to Donna as a "dumb cunt". (A884-887; 909-910; 923; 4422). Captain Rongione and Captain Glass also used derogatory terms to refer to females. (A554-558; 503-505; 541-543).

The hostile environment was by no means limited to verbal abuse; there was overwhelming evidence of "an institutionalized practice", to use the words of Inspector Snellbaker, of obscene writings and drawings displayed throughout the ACPD since at least 1968. (A255-258; 363; 371-75; 500-502; 528-535; 579-581; 583-589; 590-596; 1086-1095; 1144-1147; 1845-1856; 1863-65; 1939; 4193-4196; 4262-66; 3897-98). After Donna was promoted to Sergeant in 1987 and assigned to Charlie Platoon (11 p.m. to 7 a.m.) in 1990, she became the primary focus of the "artwork", (A1108-1109; 1139-1144), with P1 being a typical depiction: a nude woman on her hands and knees with her vagina not only clearly displayed but actually outlined in red, accompanied by doggerel referring to anal penetration and ejaculation in her face, posted in the Department for literally years. (A688-690; 696-699; 961-966; 1947-1949). Very few such drawings were of males. (A965). As of the date of the trial, the ACPD still had made no effort whatsoever to investigate the persons responsible, to impose discipline, to educate and train the officers as to the gross impropriety of such conduct, or indeed to do anything other than, on a few occasions, paint over the drawings, apparently to provide a clean canvas for the next foul depiction. There was ample evidence that the existence of these drawings were known throughout the highest levels of the ACPD, (A275-280; 1300-1304; 3207-09), particularly since a lifesize nude depiction of Donna engaged in sex was on the roll call room wall, (A751-758), where most officers were required to assemble at the beginning of each of three shifts on a daily basis, while roll was called either by a Sergeant or Captain. When Officer Dottie Smith removed a depiction of Donna from a restroom wall, it not only reappeared the next day with a reference to Smith, (A371-375; 696-705; 711-712), but resulted in her being chastised

by Sergeant Fair (since promoted to Captain in charge of Internal Affairs) for violating the "First Amendment rights" of the artist! (A712-717). Fair has also never been disciplined. Perhaps the most egregious aspect of these drawings was the fact that they were permitted to persist in restrooms available to the public, such that Donna's young daughter, Brittany, was exposed to one depicting Donna performing fellatio when her father allowed her to go to the restroom when she came to visit her mom at work. (A1278-12180; 1982-1984). Although the jury did not hear about the most dire consequence, that being Brittany's subsequent suicide attempt, the record is clear that Donna was aware of this event and of the ACPD's willful refusal to respond. (A1441-1443).

Not content with merely subjecting its female employees to a daily diet of verbal and pictorial abuse, the department also routinely allowed the introduction of graphic sexual appliances, magazines and feminine hygiene products into the workplace, with utter indifference the only response from upper management. (A1618-1619; 1632-1635). Thus, when Donna was assigned to Charlie Platoon, a dildo was affixed either to the wall or the podium in the roll call room. (A429-431; 1036-1038; 1059; 1147); Madamba, who now seeks to portray himself as Donna's guardian angel, admitted driving around Atlantic City on a Sunday morning with a dildo affixed to his ACPD car antennae, lamely claiming that he did not have the time to reach out, as he walked by, to remove it before starting his tour of duty. (A4448-4450). Madamba also refused to order removal of a sanitary napkin, emblazoned with red sergeant chevrons and hanging over the podium from which plaintiff was required to call roll, for three days, or nine full tours of duty, in what can only be construed to be a deliberate attempt to humiliate and

embarrass Donna, the napkin being replaced even after it was removed on more than one occasion. (A422-429; 765-770; 1030-1036; 2492-98). Though this event was known throughout the ACPD, and was reported directly to Captain Burrus (A1070-1071; 1075-1078), ACPD has done nothing to investigate or discipline those responsible even to this very day. Plaintiff had similar events happen to her in the academy, involving tampons hanging from her ACPD vehicle mirror, Hustler magazines left in her vehicle, dildos being openly displayed at academy premises, and officers using their police batons to depict an erect phallus while standing behind Donna; contrary to ACPD claims that she was "hypersensitive", at no time did she let those responsible for any of this sexist ridicule see just how badly it hurt her.

Defendant Mooney, who was aide to the Chief and his personal confidante until approximately April, 1990, (A1972-73), suggested to plaintiff in that year that she had been "under the Captain's desk", an obvious reference to oral sex; in Madamba's presence he said he had heard she liked them "hard and stiff", advised her that she could drink her coffee from his "jock cup", and routinely ridiculed her at the workplace, referring to her as a pencil pusher who laid on her back. (A2512-17; 2660-62). This was consistent with Mooney's appalling 1992 conduct toward Officer Deborah Rando, who was not only verbally abused by Mooney, (A929-933), who falsely called her a liar, falsely claimed that she had endangered another officer's life, and badgered and berated her to the point of tears, (A941-947), but who engaged in such grotesqueries as telling Rando that he had considered placing mayonnaise on her leg while she dozed during a break, in order that she would wake up and believe it to be ejaculate. (A933-936). On another occasion, he asked what was between Rando's legs, stating that he would like

to be the soda can there. (A936-939). His abuse of her was so bad that Rando was forced to involve the PBA President, after her complaints to Captain North about his misconduct resulted in the captain inviting her to his house for dinner. (983-985; 968). Again, there was no investigation of either North or Mooney, and while ACPD generated documentation falsely suggesting that Mooney had been "counselled" (but *not* reprimanded or otherwise disciplined), Mooney admitted even that was untrue. (A2048-2054). Mooney was not even mildly upset about Rando's complaint. (A4146-47). Not only has the ACPD refused to investigate Mooney, but in fact he has since been promoted to Captain and has acted as the ACPD Legal Affairs Officer.

In conduct similar to that of Captain North, Madamba's response to Donna's request that he do something to control the disrespectful and insulting behavior of the "gang" of officers on Charlie Platoon was a suggestion that in private industry, females who have affairs with their supervisors are protected as a result. Madamba had harassed plaintiff and sought to induce her to leave the all-male Charlie Platoon (A4312-13) from the beginning, telling her that he did not expect her to be on it very long, claiming she was inept (A4326-29), requesting that she make a false application for a hardship transfer to another platoon, and when she refused to falsify such a request, surreptitiously requesting that she be swapped with a male captain. (A4307-4310). He further sat idly by while male officers treated her with insolence and disrespect. In March, 1990, she requested that he intercede, at which time he suggested a sexual relationship, telling her that he loses weight by having sex two times a day, that women come to him when they are ready, and that while harassment happens to women in private industry, women get protection from such harassment by sleeping with

their superiors. (A2498-2508). When she complained that she had not received back up from her male officers, and that they repeatedly "clicked" her out so that she could not communicate on a radio, (A2546-47), Madamba did nothing. Madamba made fish references (A2540-41) and openly laughed at obscene caricatures of her; when asked to take down the sanitary napkin, he told a sergeant to leave it up. (A4344-46; 4408-4410). Ultimately, he advised Donna in September, 1990, that with the new recruits coming out of the Academy, he was asking to swap her for a male sergeant, telling her that she was not effective as a female supervisor, admitting that she had been repeatedly harassed, and telling her that the "higher ups" in the Department agreed with him. (A2553-58). When she responded that she would sue for discrimination if he did swap her, Madamba continued his campaign of retaliation, inducing the Chief to issue a letter threatening to demote her, (A2560-67), based on a false allegation of abuse of sick time, despite there being numerous male officers on Charlie Platoon whose personnel files confirm that they had in fact been abusing their sick time who received no warning letters whatsoever. Although the Department has claimed that Donna's letter was merely a departmental form, the parties stipulated, in response to a subpoena, that only one other officer had received such a letter during that time period (A3231-32), despite Acting Chief McDuffy's sworn testimony that he had sent out 60 to 90 such letters at that time. After Donna declined his advances, the retaliation began. Madamba routinely belittled the plaintiff, sending subordinate patrol officers to check up on her work, giving her contradictory instructions in order to ridicule her in front of roll call, and telling her that she should not send prisoners complaining of injuries to the hospital, as required by the Eighth Amendment, going so far as to say that she should "let them die". (A2521-25).

He falsely noted a verbal reprimand in her file, then fabricated a benign evaluation of her. (A4428-29; 2735-38). Madamba gave male sergeants with less seniority plaintiff's requested days off (A2655), and did the same with plaintiff's requested vacation time. (A2561-63). This ten-month period of abuse resulted in plaintiff requesting that she be transferred from Madamba's supervision, while asking to remain on the same shift; when Chief Rifice learned of Madamba's misconduct, he admitted he was not surprised. (A3101-03).

To complement its practice of requiring women to consistently work in a hostile environment, the ACPD has a history of giving women demeaning, "dead end", non-supervisory positions. (A957-959). Plaintiff is a perfect example. After she became a sergeant in 1987, she was assigned to the Detective Bureau for a few weeks, which was the last time she was in a position to command any men until she came under Madamba's supervision on Charlie Platoon in 1990. (A1225-1229; 2431-36). During the interim, she was the court liaison officer, a timekeeper supervising no one, (A1244; 2439-42), then in charge of the "Truancy Task Force", which position consisted only of Hurley and two civilian subordinates, gave her no responsibility, and isolated her a mile from the police premises. (A2462-69). Before becoming a sergeant, she was required to sit in her vehicle alone and watch a building to make sure that no arsonists burnt it down for a period of six months, which assignment was never given to any male. (A2423-27). Donna appears to be the only person ever assigned by the police chief to a desk sergeant as a permanent assignment (A2473-77), which required her to work in a building so cold and dank in the winter and so hot and humid in the summer as to be called the "Temple of Doom", a job that was so undesirable that it was usually rotated amongst sergeants, as

the undisputed testimony confirmed. (A2030, 2076-77; 2480-81; 1485-89). After she could no longer endure Madamba's harassment and requested in writing that she be transferred out from under his command, but still remain on Charlie Platoon, (A1316-1319), she was transferred to yet another dead-end, demeaning clerical job, being put in charge of records and evidence, with special hours of 6:00 p.m. to 2:00 a.m. created and designated for her, and her alone. (A332-334; 357-360; 2517-19). To make certain that the Department got the message through to her as to the consequences of complaining of sexual harassment, she was subjected to a number of frivolous Internal Affairs investigations of her conduct while in charge of evidence, but was always exonerated. Although every single one of her supervisors admitted that she was an excellent employee who did more than competent work, and in fact she received an award for heroism from the Department and was selected as one of the ten most distinguished women by the Atlantic County Women's Advisory Committee (A2685-86), Madamba and the Department attacked her as an incompetent coward.

Regarding the Petitioner's inaccuracies, the ACPD has failed to advise the Court that Hurley did complain to Madamba about the roll call room graffiti, and was told in response that she must "ignore it". (A2768-2769). Regarding the sanitary napkin displayed with sergeant's stripes, Hurley unequivocally testified that she did complain to Madamba. (A2763). Petitioner's citation to the record pertaining to its allegation regarding "clicking out" and the belittlement at roll call are both inaccurate. (A4355; A2750). Moreover, Petitioner's claim that Dr. Hoyme, plaintiff's treating psychiatrist, testified that plaintiff's condition was "not severe", is flat out false; Dr. Hoyme testified, in no uncertain terms, that the psychological pain inflicted upon Hurley by the obscene depictions of her caused "the worst psychological pain one could experience by

any means. But I think it is, I think it's severe pain." (A1729; A1731). For this misrepresentation alone, the Petition should be denied.

REASONS FOR DENYING THE WRIT

THE THIRD CIRCUIT OPINION WAS FAIR, PROPERLY DECIDED, SUPPORTED BY THE FACTUAL RECORD, AND CONSISTENT WITH THE STATE LAW CLAIM PRESENTED.

Pursuant to Rule 10, certiorari is to be granted "only for compelling reasons." An accurate review of the record below amply establishes the propriety of denial of the Petition pursuant to Rule 14.4.

The foundation of Petitioner's argument is the incorrect notion that this Court's recent decision in *Burlington Industries Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), should control the outcome of this case, which was tried years earlier, despite the well supported findings by the majority that "even if the jury instructions are not quite right with regard to *Faragher*, there is no colorable argument that they misstated New Jersey law." (App. 47-48). Indeed, both the majority and the dissent agree that the disputed charge is completely consistent with the New Jersey Supreme Court enunciation of the cause of action in *Lehmann v. Toys 'R Us*, 626 A.2d 445, at 452 (N.J. 1993). (App. 49, n.19; App. 83). Under New Jersey law, a *quid pro quo* claim "involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse

employment consequences." *Lehmann*, *supra*, 626 A.2d at 452. New Jersey law has never required that a *quid pro quo* claim be supported by the additional element of proof of a tangible employment action as a result of the refusal to accede, such that New Jersey law is substantially different from, and more expansive than, Title VII law on this particular issue. (App. 49, n.19; App. 85, n.2).

Not only was the District Court's charge to the jury absolutely correct under New Jersey law, it is undisputed that the Petitioner never submitted a request for charge containing the *Burlington Industries* definition, such that the issue was not preserved at the District Court level, and should not occupy this Court's time. It would be unfair in the extreme to Respondent Hurley were a recent decision of this Court to be applied retroactively to upset a lower court decision squarely supported by an accurate jury charge on state law at the time of the jury's decision. There is no proof whatsoever that there are any other cases pending which would turn on a resolution of the issue advanced by Petitioner. *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965). Given the absence of proof of the existence of such other cases, and the absence of adequate time for the District Courts and Circuit Courts of Appeal to digest *Burlington Industries*, this issue is not yet ripe for review; this argument is further supported by the absence of any indication that the New Jersey Supreme Court would redefine a *quid pro quo* cause of action so as to modify the *Lehmann* definition to comport with the *Burlington Industries*' definition.

Respondent further submits that there is no real or intolerable conflict amongst the circuits, contrary to the argument of the Petitioner, inasmuch as the decisions cited

were based on their particular facts. As noted by the majority opinion, the cases upon which it relied are readily distinguishable from those relied upon by the dissent, with the dissent cases involving circumstances under which the record made it impossible to determine the basis for the jury's decision. (App. 51-53, n.21, n.22). Moreover, given the abundance of cases there cited, it appears that this is not a "novel" issue, nor is the conflict one which could reasonably be construed to be intolerable; indeed, there are plenty of conflicts, such as this one, on a variety of legal issues amongst the various circuits that do not even come close to being those that are so intolerable as to mandate the utilization of this Court's limited temporal resources.

Although the Petitioner and the dissent both claim an absence of factual support for plaintiff's judgment, both the District Court, which sat through the trial, and the majority opinion determined the facts in favor of the plaintiff; under such circumstances, certiorari is inappropriate. *See, e.g., Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

The last argument raised by the Petitioner is the notion that the Judgment appealed from would result in no time savings. Respondent respectfully disagrees. This case has already occupied nearly eight years of Respondent's time, an experience she shares with numerous other litigant-employees of Atlantic City, every one of whose discrimination cases is being defended "tooth and nail". Were this Court to deny the Petition, the Judgment confirming a hostile work environment will be final, and can be utilized to avoid the necessity to adduce proofs in many of those other cases, resulting in literally weeks, if not months, of trial time being saved. Respondent respectfully submits that

both Judges Becker and Scirica undoubtedly had this factor in mind, based upon information disclosed to the Court in oral argument pertaining to the other outstanding cases. Respondent further submits that a denial of the Petition may encourage the Petitioner to approach settlement realistically, and could perhaps even induce it to modify its settlement position by increasing its offer above the last and only one of $2,000.

CONCLUSION

Based upon the facts, law, and arguments set forth above, Respondent respectfully submits that the appropriate disposition of the Petition for Certification is denial.

Respectfully submitted,

STEVEN K. KUDATZKY
Counsel of Record
Sagemore Corporate Center
10000 Sagemore Drive
Suite 10202
Marlton, New Jersey 08053
(856) 988-3131

On the Brief:

CLIFFORD L. VAN SYOC
JAMES E. BURDEN

Attorneys for Respondent